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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-6637

WILLIAM DALE DAVIS,

Petitioner,

- v -

THE STATE OF OKLAHOMA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of the State of Oklahoma entered September 17, 1975.

CITATION TO OPINION BELOW

The opinion of the Court of Criminal Appeals of the State of Oklahoma is reported at 542 P.2d 552 (Okla. Cr. App. 1975) and is set out as Appendix A hereto, pp. 1-21, infra.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

The opinion below was reaffirmed on rehearing on Novem-

ber 25, 1975. The time within which a petition for certiorari might be filed was extended by order of Mr. Justice White, dated February 17, 1976, to March 24, 1976, and further extended by order of Mr. Justice White, dated March 15, 1976, to April 23, 1976.

QUESTIONS PRESENTED

1. Does the post facto invalidation of a statutory provision empowering an appellate court to conduct an evidentiary hearing and thereafter to reduce the death penalty imposed for the crime of first degree murder violate Article I, Section 10 of the Constitution or the Fourteenth Amendment, where the effect of such an invalidation is to subject a criminal defendant to an irreducible death sentence that was not authorized by law at the time of his offense?

2. Does the imposition and carrying out of the sentence of death for the crime of first degree murder under the law of Oklahoma violate the Eighth or Fourteenth Amendment to the Constitution of the United States?

3. Did the exclusion for cause of veniremen on the ground of expressed attitudes toward the death penalty violate petitioner's rights under the Sixth or Fourteenth Amendment to the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States and the Ex Post Facto Clause of Article I, Section 10 of the Constitution of the United States.

2. This case also involves the following provisions of Oklahoma law:

21 Okla. Stat. Ann. § 701.1 (1975-76 Supp.)

"Murder in the first degree.

"Homicide, when perpetrated without authority of law and with a premeditated design to effect the death of the person killed, or of any other human being, is murder in the first degree in the following cases:

"1. When perpetrated against any peace officer, prosecuting attorney, corrections employee or fireman while engaged in the performance of his official duties;

"2. When perpetrated by one committing or attempting to commit rape, kidnapping for the purpose of extortion, arson in the first degree, armed robbery or when death occurs following the sexual molestation of a child under the age of sixteen (16) years;

"3. When perpetrated against any witness subpoenaed to testify at any preliminary hearing, trial or grand jury proceeding against the defendant who kills or procures the killing or the witness, or when perpetrated against any human being while intending to kill such witness;

"4. When perpetrated against the President or Vice President of the United States of America, any official in the line of succession to the Presidency of the United States of America, the Governor or Lieutenant Governor of this state, a judge of any appellate court or court record of this state, or any person actively engaged in a campaign for the office of the Presidency or Vice Presidency of the United States of America;

"5. When perpetrated by any person engaged in the pirating of an aircraft, train, bus or other commercial vehicle for hire which regularly transports passengers;

"6. When perpetrated by a person who effects the death of a human being in exchange for money or any other thing of value, or by the person procuring the killing;

"7. Murder by a person under a sentence of life imprisonment in the penitentiary;

"8. When perpetrated against two or more persons arising out of the same transaction or occurrence or series of events closely related in time and location;

"9. When perpetrated against a child while in violation of Section 843, Title 21 of Oklahoma Statutes; and

"10. Intentional murder by the unlawful and malicious use of a bomb or of any similar explosive."

21 Okla. Stat. Ann. § 701.3 (1975-76 Supp.)

"Punishment for murder in the first degree -- Instructions regarding lesser and included offenses.

"Every person convicted of murder in the first degree shall suffer death. In the case of a jury trial, the jury shall determine only whether the defendant is guilty or not guilty of murder in the first degree and upon a finding of guilty shall so indicate on their verdict and state affirmatively in their verdict that the defendant shall suffer death. In a case where a jury trial is waived, and the case is tried to the court, or upon a plea of guilty to the court, upon a finding by the court that the defendant is guilty of murder in the first degree, the court shall enter a judgment and sentence of death. In a jury trial for murder in the first degree, nothing in this section shall preclude the trial judge from instructing the jury regarding lesser and included offenses and lesser degrees of homicide if the evidence warrants such instructions; but in every instance where an instruction authorizes the jury to consider lesser and included offenses and lesser degrees of homicide, the judge shall state into the record his reasons for giving the instruction based upon the evidence adduced at trial."

21 Okla. Stat. Ann. § 701.5 (1975-76 Supp.)

"Review of judgment and sentence of death.

"The Court of Criminal Appeals when reviewing

a judgment and sentence of death shall, in the first instance, determine whether errors of law occurring at trial require reversal or modification, but if the Court shall determine that there are no errors of law in the record requiring reversal or modification, the Court shall then convene for the purpose of reviewing the sentence of death. The Court shall set a date certain for an evidentiary hearing, the purpose of which will be to determine if the sentence of death comports with the principles of due process and equal protection of the law. Upon the hearing the Court shall determine whether the sentence of death was a result of discrimination based on race, creed, economic condition, social position, class or sex of the defendant or any other arbitrary fact; and the Court shall specifically determine whether the sentence of death is substantially disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

21 Okla. Stat. Ann. § 701. 6 (1975-76 Supp.)

"Modification of death sentence.

"Should the Court determine that the sentence of death is discriminatory or is substantially disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant, the Court shall modify the sentence of death to life in the pentitiary at hard labor."

STATEMENT

Petitioner and Joney Joe Lusty were jointly tried before a jury in the District Court of Oklahoma County, Oklahoma, for the crime of murder in the course of an armed robbery.

The body of the victim, Raymond Martin, was found by his sister on the kitchen floor of his apartment on March 30, 1974 between 10:30 and 11:00 am. (T.166-67) It was stipulated that he had "died of multiple stab wounds." (T.244) Mr. Martin had been the manager of the apartment building in which he and the defendants had resided. (T. 221.)

Detective Guinn had interviewed petitioner after his arrest. (T.224.) He testified that petitioner was advised of his rights and denied any involvement in the crime for a period of approximately one hour. Between thirty and forty-five minutes after his co-defendant was brought into the interrogation room, petitioner agreed to give and sign a statement (T.239-40)[1/] which was taken in question and answer form and simultaneously transcribed by a typist (T.225). Petitioner's statement, read

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1/ At a preliminary hearing regarding the admissibility of the statement, Officer Guinn testified that Davis had seen one or two prior written statements of Mr. Lusty before being confronted with him. (T.178) When Mr.Lusty was brought in, he "repeated an earlier statement he had made to us in the presence of Mr. Davis," saying "... that Mr. Davis had done all of the actual stabbing, that Mr.Lusty had taken the money out of the pockets of the dead man," whereupon petitioner said "'I did it, I would like to tell you about it.'"

into evidence by Officer Guinn was that he "told Joney that ... [they] could rob the manager and I told him I was going to kill him. He didn't believe ... [petitioner] and he went to sleep for awhile. (T.280.) When Mr. Lusty awoke petitioner raised the subject again and he agreed to go with petitioner to rob Mr. Martin. (T.281.) They knocked on the door and were asked what they wanted; petitioner told him they wanted to pay rent. When Mr. Martin opened the door and turned to walk toward the kitchen petitioner "pulled a knife and started stabbing him." (Id.) Petitioner estimated that he had stabbed Mr. Martin approximately twenty times.(T.282.) When asked if he intended to kill him when he went in, petitioner responded that he had; when asked why, he said "I was just pissed off." (T.283.) He identified the murder weapon as a hunting knife which he had helped the police to recover, and described giving a butcher knife found in the victim's kitchen to Lusty and dividing money found in the apartment. (T.285.) Asked if he wished to add anything he said, "I did the killing and Joney Joe Lusty didn't have anything to do with it."

One of two written statements given by Mr. Lusty was also read into evidence. (T.272.) This statement differed in several respects from that of petitioner:

> Me and Willie was sitting in the room talking, his first subject was why don't we rob the manager, that he wanted to rob the manager. I told him no that it wouldn't be worth it. So I told him I was going to move. So I packed my clothes up. Willie helped me take my clothes to a mission on Southwest 5th, then we came back to the room. About 6:30 Willie brought up the subject again about robbing the manager. He said it would be easy. I told him that it wouldn't. He said that the manager carried a lot of money on him all the time. He told me he had seen the manager with a lot of money some time ago. I told him that I would think about it and dozed off and went to sleep. When I woke back up the time was 10:00 p.m. Willie asked me again if I wanted to go through with the robbery. So I told him O.K. Me and Willie knocked on the manager's door. The manager looked outside the window. I had told the manager that we come to pay the

rent. He let us in and as we was walking I was beside the manager ... and Willie was behind the manager. As we got halfway through the kitchen Willie stabbed him in the back and stabbed him again. Willie had his arm around the manager's neck and kept stabbing him and he staggered to the kitchen and then fell on the floor on his back and he stabbed him again in the stomach and on the side and up in the chest and I got up and closed the curtain and turned on the light. I looked in the drawer and Willie was doing the same. Then we went in the living room, looked in the bookcase bed, and found a .22 pistol. I handed it to Willie, then I went to look in the drawers in the bedroom. Came back out, back in the kitchen I found a watch and some keys. I got a towel and wiped up the blood on the floor. Willie had picked up a knife, a butcher knife, and handed it to me. Then we went back to the living room, no that's wrong, we was in the kitchen, then I took the man's billford out of his back pocket, took another one out of the front pocket and went through the drawers in the kitchen, we didn't find anything else. Walked back in the living room found a jar of quarters and dimes on the television. We took the money out of the jar and left the jar there. After that we went up toward the door to see if anybody was coming, went back to our room and I pulled out some small bills and laid it on the bed and Willie said to go ahead and split it some where else. We changed clothes in our room. Willie picked up a box that had out old clothes in there and white towel that I had, I put it in the trash can. I took the trash can out in the back, that had the white towel in it. I walked down the road about a half a block and hide the butcher knife. As I was coming back towards the apartment Willie was coming out with a big box. We went down the road towards the alley and I took out the shirt and pants that I had on out of the box and we went on down the alley. I walked faster than Willie did and he came about half a block behind me. We went up towards 7th Street, that would be heading east, we went to behind a building somewhere and threw the box away. We walked south where my old apartment used to be at and there I took out the money and gave it to Willie, then he split it with me. From there we went back to SW 2nd Street by South Lee where he went south and I kept on walking on SW 2nd. I then took the little black coin purse by the corner light and opened it up, took the change out of there, put the black pocketbook in my pocket. I then took out the other billfold that I had taken from the manager and opened it up. There was some money in there, I don't know how much. I took the money out of it and put it in my left shirt pocket."

(T. 273-76.)

Mr. Lusty also said that he had drunk a six pack of beer at about noon but that neither he nor petitioner had been sniffing glue (T.276); that petitioner's knife was drawn before they entered the apartment (T.277) and that he had found a large amount of cash in the victim's left pants pocket (id.).

Officer Chambers identified a butcher knife which Mr.Lusty had helped him to recover (T.262), and Detective Guinn identified a hunting knife which petitioner had helped him to recover after agreeing to "show us where he had hidden the knife that he had used to kill Mr. Martin" (T.227). Detective Guinn identified $3,600.00 which Mr. Lusty had given to his brother and which was recovered at the brother's home in the presence of Mr. Lusty who said that "this was the money he had found on the murder victim." (T.238.) Officer Shubert identified a watch which he had removed from Mr. Lusty's pocket (T.258), and Mr. Martin's sister stated that it had belonged to the victim (T.167).

After all parties had rested -- defendants having offered no evidence -- the court announced in the following terms his decision not to instruct on any lesser crimes:

> "First of all, I don't thing [sic] there is any way that Murder in the Second Degree can be instructed on here under the evidence, simply because Murder in the Second Degree under the statutory definition is homicide 'when perpetrated without authority of law, and with a premeditated design to effect the death of a person or of any other human being, but by an act not enumerated in the preceding section.'
>
> The State's case is homicide committed during an armed robbery, which is stated in the definition of Murder in the First Degree.
>
> 'When perpetrated without any design to effect death by a person engaged in the commission of any felony other than the felonious acts set out in Section 1 of this act.' Again, which is Armed Robbery which is set out in Section 1. I don't think it can be instricted here under the evidence."

(T.308-09.) At this point Mr. Lusty was permitted to introduce

a statement which he had given to police officers prior to the giving of the statement introduced by the prosecution. In that statement Mr. Lusty asserted that he had been under the impression that the March 29 trip to Mr. Mortin's apartment was for the purpose of paying rent. Mr. Lusty's motion for an instruction on second degree murder was then renewed and overruled. (Id.)

The jury retired at 10:50 am. on June 19, 1974. At 11:35 it returned a message asking whether a person involved in an armed robbery who did not commit the actual killing was "equally responsible." (T.324.) It was referred to the court's earlier, written instructions. (T.325.)[2/] At 3:50 pm. the jury asked if it could return a verdict as to only one defendant and was told that it could do so. (T.328.) Having determined that the jury was not hopelessly deadlocked as to the second defendant, the court accepted the jury's guilty verdict as to petitioner and statement "that he shall suffer death," (T.330) and ordered deliberations resumed (T. 332). Subsequently, the jury asked for "clarifying information on premeditation" and was again referred to the instructions

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2/ Instruction No.7 had been:

> "All persons concerned in the commission of crime, whether they directly commit the act constituting the offense or aid and abet in its commission, though not present, are principals.
>
> You are instructed that the term 'concerned in the commission of a crime' means that one must either commit the crime himself, procure it to be done, or aid and abet in its commission. A mere presence, assent or acquiescence in the commission of a crime by one who did not procure or advise its commission, who takes no part therein, gives no counsel or word or encouragement to the perpetrator of the crime, does not in law constitute such person a participant in the crime.
>
> You are instructed that 'aid and abet' and 'aiding and abetting' as used in these instructions, means to assist and supplement the efforts of another in the commission of a crime, with knowledge of the wrongful purpose of such other person - giving counsel and encouragement to such person in the commission of such crime."

of the court. (T.332.)[3] At 5:15 the jury reported that it was hopelessly deadlocked as to Mr. Lusty (T.333) and a mistrial was declared as to him (T.334).[4]

Petitioner was sentenced to be "put ... to death by electrocution." (T.340.)

Eleven members of the jury panel had been excused for cause because of beliefs of various strengths regarding capital punishment and their ability to impose it. (T.15-16, 16, 17, 18, 25-26, 72-73, 74-75, 100-01, 108-09, 128-29, 148.)

3/ Instruction No.7 had been:

> "You are instructed that Murder I when perpetrated without authority of law and with a premeditated design to effect the death of the person killed, or of any other human being, is Murder in the First Degree when perpetrated by one committing or attempting to commit armed robbery.
>
> You are further instructed that the phrase 'without authority of law,' as used in this instruction, means without justification, and the phrase 'with a premeditated design,' as used in this instruction, means a mental purpose or intent to take a human life which is formed before the act. In this connection, you are instructed that a premeditated design to effect the death of a human being, sufficient to constitute murder, may be formed instantly before committing the act by which it is carried into execution.
>
> You are also instructed that a design to effect the death of a human being is inferred from the fact of the killing unless the circumstances raise a reasonable doubt whether such design existed."

4/ Upon retrial, Mr. Lusty was convicted of first degree murder and sentenced to die. Lusty v. State, 542 P.2d 545 (Okla. Cr. App. 1975)(petition for writ of certiorari filed March 25, 1976 (No. 75-6453)).

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

In his Petition in Error to the Oklahoma Court of Criminal Appeals, petitioner asserted as Error No. 6 the exclusion for cause of jurors not in favor of the death penalty. In his brief below, he asserted the unconstitutionality of the death penalty. The latter contention was explicitly rejected below, Davis v. State, 542 P.2d 532, 537. Although the former contention was not explicitly rejected, the court below stated that it had "carefully reviewed the entire record . . . and thoroughly considered the argument and authority presented and . . .[had] determined that the record is free of any error of law requiring reversal." Id.

On rehearing, petitioner argued that imposition of the penalty of death in his case would, in view of the decision of the Court of Criminal Appeals severing provisions for imposition of an alternate sentence after a hearing on appeal, violate the ex post facto provisions of the Constitution of the United States. That contention was rejected, for the reasons set forth in Williams v. State, 542 P.2d 554, 596-7 (Okla. Cr. App. 1975), and the decision upholding petitioner's death sentence was affirmed, Davis v. State, supra, 542 P.2d at 544.

REASONS FOR GRANTING THE WRIT

I

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE POST FACTO INVALIDATION OF A STATUTORY PROVISION EMPOWERING AN APPELLATE COURT TO CONDUCT AN EVIDENTIARY HEARING AND THEREAFTER TO REDUCE THE DEATH PENALTY IMPOSED FOR THE CRIME OF FIRST DEGREE MURDER VIOLATES ARTICLE I, SECTION 10 OF THE CONSTITUTION OR THE FOURTEENTH AMENDMENT, WHERE THE EFFECT OF SUCH AN INVALIDATION IS TO SUBJECT A CRIMINAL DEFENDANT TO AN IRREDUCIBLE DEATH SENTENCE THAT WAS NOT AUTHORIZED BY LAW AT THE TIME OF HIS OFFENSE.

In order to spare the Court repititious argument, petitioner adopts, as to the this issue, the reasons set forth at page 10-20 of the Petition for Certiorari in Green v. Oklahoma, No. 75-6451. The relevant portions of that petition are attached as Appendix B.

II

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF FIRST DEGREE MURDER UNDER THE LAW OF OKLAHOMA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Petitioner's contentions that the laws under which he was convicted and sentenced fail to preclude arbitrary infliction of the death penalty, and that this is so largely because those laws are excessive, regressive and inconsistent with contemporary standards of decency, are similarly presented by incorporation of pages 10-16 and 20-38 of Appendix B.

III

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE EXCLUSION FOR CAUSE OF VENIREMEN ON THE GROUND OF THEIR EXPRESSED ATTITUDES TOWARD THE DEATH PENALTY VIOLATED PETITIONER'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

During the selection of petitioner's jury, eleven panel members were excluded because of their expressed attitudes toward the death penalty. The panel was addressed as a whole as follows:

> "Now, I need to tell you a very important thing, another important thing, so that we can get it out of the way right away and let you consider it right away.
>
> This case is one that charges the crime of First Degree Murder. Under our laws it carries, if you find the defendant guilty, the death penalty. I want you all to know that. There may be certain other options here, I don't know yet. I will have to hear the evidence the same as you do to see if there are any other options. Of course, you have the not guilty option.
>
> I know that the instructions will include, very likely, an instruction concerning the death penalty if you find the defendant guilty of certain things that will be explained and defined to you.
>
> Let me hasten to point out the fact that you are given some option doesn't mean that you are going to exercise that one, but it means that is one of the laws that applies to the facts. All of this is to say that unless you can consider and in a proper case apply that law and any others, then you would not be qualified to serve on this jury.
>
> In any jury case the State of Oklahoma is one party and the defendant is the other party. The State of Oklahoma, of course, has rights and these defendants have rights in this lawsuit. The State of Oklahoma is entitled to have a jury instructed on all the laws that apply, as are these defendants.

> Unless you can, each of you, consider and in a proper case apply that law then, of course, ou would not be qualified to sit on this jury. Obviously, if you would say that you cannot consider one of the instructions that I am going to give you, then you cannot fairly and impartially try this case.
>
> Now, let me go on and point out that I am not saying that you must be able to say that you like the death penalty. Many jurors serve on juries who perhaps might not like that law, might think that it should not be the law, but many say that since it is the law they can sit on a jury where that is an option, and they go ahead and serve.
>
> The fact that you don't like something and find it hard is not in and of itself sufficient to excuse you from serving on a jury where that is an option. If because of some deep seated feeling you could under no circumstances ever consider the death penalty, then you should not serve on this jury.
>
> Let me hasten again to point out, first of all, you must consider, it is the primary and first thing that you must consider, is whether these defendants are guilty. If they are not guilty then you don't even get to the punishment. If you find that they are guilty of something then you must consider the instructions dealing with punishment, one of which will be the death penalty."

(T.13-15.)Nine members were excluded thereafter on the basis of state ments that they could not "consider" the death penalty.(T.15-16,16, 17, 18, 72-73, 100-01, 108-09, 128-29, 148.)

Venirewoman Lecompte answered "There is no way that I could consider the death penalty, I had rather not," (T. 25) to which the court responded

> "All right. You have heard my explanation to the jury, that we are not talking about whether you like the law or whether you had rather have

somebody else do that. We are not talking about that, we are talking about whether you could under any circumstances consider it and impose it in the proper case."

(T.26.) Her answer was "I don't know. I would hate to go all the way and then find that I couldn't." (Id.)

When the court described the consequences of a first degree murder verdict to venireman Abbott and asked if he could consider the death penalty among other possible options, he first said that he could. The following exchange then occurred:

"THE COURT: If the evidence so warrants it, in your opinion, can you and would you be able to consider that in a proper case and vote for the death penalty?
MR. ABBOTT: I don't believe I could.
THE COURT: I thought you just said that you could.
MR. ABBOTT: I would rather not.
THE COURT: Again, I think most of us would rather not. Assuming that you would rather not, can you?
MR. ABBOTT: Yes.
THE COURT: Is there any doubt in your mind about it?
MR. ABBOTT: No.
THE COURT: I'm not sure that I understand. You have given two different answers, one that you could and one that you couldn't.
MR. ABBOTT: I would rather not.
THE COURT: You would rather not or couldn't?
MR. ABBOTT: I would rather not.
THE COURT: What I need is an answer, one way or the other, can you consider it?
MR. ABBOTT: No, I would not.
THE COURT: You would not?
MR. ABBOTT: No, sir.
THE COURT: Under any circumstances you could not consider it, or wouldn't?
MR. ABBOTT: I would not."

He was then excused.

The question presented here is the extent to which the State is empowered to sweep from the jury those veniremen with conscientious scruples against the death penalty under capital trial procedures in which the jury does not make a separate determination of sentence after it has ascertained guilt. The trial court clearly applied a standard which allows the exclusion of veniremen on account of their feelings concerning the death penalty upon a "broader basis" than the standard which Illinois was held to have violated in Witherspoon, 391 U.S. at 522 n.21.

Although the primary focus of the Witherspoon decision was on the jury's pre-Furman role of "determin[ing] whether [a defendant's] . . . sentence should be imprisonment or death," Witherspoon v. Illinois, supra, 391 U.S. at 518 (footnote omitted), the Court also laid down standards for exclusion of jurors whose death-penalty scruples might interfere with their determination of the separate question of guilt or innocence. The Court noted that:

> "statutes and rules disqualifying jurors with scruples against capital punishment are often couched in terms of reservations against finding a man guilty when the penalty might be death . . . . Yet, despite such language, courts . . . have sometimes permitted the exclusion for cause of jurors opposed to the death penalty even in the absence of a showing that their scruples would have interfered with their ability to determine guilt in accordance with the evidence and the law. See, e.g., . . . Smith v. State, 5 Okla. Cr. 282, 114 P. 350, 351."

Witherspoon v. Illinois, supra, 391 U.S. at 513 n.5 (emphasis

in original). The Court ruled that before veniremen could be excluded on the ground that their death penalty scruples made them biased on the issue of guilt, it must be "made unmistakably clear . . . (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." Witherspoon v. Illinois, supra, 391 U.S. at 523 n.22 (emphasis omitted).

The exclusions in this case were clearly not based upon "unmistakably clear" inability to make an impartial decision as to guilt or innocence. The perfunctory nature of the questioning of the panel members, and the failure to clearly determine in each case, by individual questioning, whether those members opposed to the death penalty would be able to make an impartial guilt-innocence determination raise serious questions as to the propriety of their exclusions.

The tendency of trial judges to sweep too broadly in excluding death scrupled jurors is, in part, a function of peculiar characteristics of the Oklahoma death penalty statutes. Although it is provided that "the jury shall determine only whether the defendant is guilty or not guilty of . . . [capital] murder . . . " it is required to include in any capital verdict an affirmative statement "that the defendant shall suffer death." 21 Okla. Stat. Ann. §701.3 (1975-76 Supp.). The Court of Criminal Appeals has indicated that a failure to do so would not have the legal effect of sparing the defendant's life, Williams v. State, supra, 542 P.2d at 578-579. The provision

therefore stands to needlessly complicate the moral dilemma of the death scrupled but conscientious venireman by apparent overlap of the sentencing and guilt determination processes, and to invite voir dire interrogation regarding the ability to impose a sentence of death rather than the ability to return a verdict of guilt consistent with the evidence, regardless of the knowledge of future sentencing consequences.

This court should therefore grant certiorari to consider whether petitioner's fundamental right to a fair and impartial trial in which the "scales . . . are not deliberately tipped toward death," Witherspoon v. Illinois, supra, 391 U.S. at 522, has been denied.

CONCLUSION

Petitioner prays that the petition for a writ of certiorari be granted.

RESPECTFULLY SUBMITTED,

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APPENDIX A

RECEIVED FOR CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

WILLIAM DALE DAVIS,	]	FOR PUBLICATION
	]	
Appellant,	]	
-vs-	]	No. F-75-38
	]	
THE STATE OF OKLAHOMA,	]	
	]	
Appellee.	]	

AUTHORIZED FOR FILING
SEP 17 1975
COURT OF CRIMINAL APPEALS

- OPINION -

PER CURIAM:

Appellant, William Dale Davis, hereinafter referred to as defendant, was charged, tried and convicted in the District Court, Oklahoma County, Case No. CRF-74-1175, for the offense of Murder in the First Degree, in violation of 21 O.S. Supp.1974, § 701.1. His punishment was fixed at death, and from said judgment and sentence a timely appeal has been perfected to this Court.

The defendant was charged and tried jointly with Joney Joe Lusty, hereinafter referred to as defendant Lusty; however, the jury was unable to agree upon a verdict with respect to defendant Lusty, and for this same offense he was subsequently tried and convicted of Murder in the First Degree in an independent trial. See, Lusty v. State, Okl.Cr., ____P.2d ____, F-75-71 (1975).

At the trial, the State's first witness, Kathryn Gadberry, testified that Raymond Martin was her brother. On the morning of March 30, 1974, at approximately 10:30 a.m. she went to her brother's apartment at 1219 N.W. 8th and found him dead on the kitchen floor. She identified State's Exhibit No. 1 as the watch her brother purchased at A.M.C., and State's

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Exhibit No. 2 as a knife that her sister had given to her brother, Raymond Martin.

The State's second witness, Barney Smythe of the Oklahoma City Police Department, testified that at approximately 10:30 a.m., March 30, 1974, he received a call to go to an apartment house located at 1219 N.W. 8th to investigate a possible homicide. Upon entering the manager's apartment he found a man lying in a pool of blood on the kitchen floor. His arms were extended back behind his head and he had dried blood encrusted on his face. His pockets were turned inside out and the left front pocket had an open safety pin stuck in it. He learned the victim's name was Raymond Martin. He identified State's Exhibit No. 5 as an accurate photograph of the man he found on the kitchen floor. At this point, State's Exhibit No. 5 was admitted into evidence, over objection by defense counsel.

The State's third witness, Kent Welsh, testified that he owned the apartment house at 1219 N.W. 8th, and that Raymond Martin was the manager of said apartment house. He identified State's Exhibit No. 6 as a key that appeared to be the key to the laundry room in the apartment house. He stated that Raymond Martin would have had that key in his possession.

The State's fourth witness, Jerry Lee Guinn of the Oklahoma City Police Department, testified that his investigation of the homicide at 1219 N.W. 8th included, in part, an interview of the defendant. The interview was conducted subsequent to the defendant being advised of his rights, which he indicated he understood. At this time, Detective Guinn identified defendant as the man he had interviewed. The questions put to, and the answers received from, the defendant were typed by a stenographer. Detective Guinn identified State's Exhibit

No. 3 as the written statement given to him by the defendant and stated that he and Marilyn Scott, Notary Public, witnessed the defendant sign this statement. The statement was admitted, over objection, into evidence. Detective Guinn next identified State's Exhibit No. 7 as a hunting knife that the defendant told him he used to kill Martin. Pursuant to directions from the defendant, the knife was recovered in an alley between South 4th and 5th Streets. State's Exhibit No. 8 was identified as an accurate photograph of the knife as it was found partially buried in the alley. State's Exhibits No. 7 and No. 8 were then admitted into evidence, over objection by defense counsel. Next, Detective Guinn testified that defendant Lusty took him to his brother Leonard's house, where money taken from the victim was recovered. State's Exhibit No. 9, a One Hundred Dollar ($100) bill, and State's Exhibit No. 12, thirty-six (36) One Hundred Dollar ($100) bills, were admitted into evidence.

On cross-examination, Detective Guinn testified that during approximately the first hour of his interview with defendant, the defendant repeatedly denied having any knowledge of the crime. Defendant Lusty was then brought into the interrogation room to confront the defendant. Defendant Lusty was present during the interview with defendant for approximately forty-five (45) minutes. Shortly before defendant Lusty was taken out of the room, the defendant confessed to killing Martin. Detective Guinn finally testified that he took a written statement from defendant Lusty on March 31, 1974, and that Officer Knight took a second written statement on April 1, 1974.

At this point in the trial, it was stipulated that if Dr. Tom Hewitt were present he would testify that he was the State Medical Examiner and that Raymond Martin had died of multiple

stab wounds.

The State's fifth witness, Detective Claude Shobert of the Oklahoma City Police Department, identified State's Exhibit No. 1 as the watch he removed from defendant Lusty's pocket at 5:15 p.m. on March 30, 1974. State's Exhibit No. 1 was admitted into evidence, over objection of defense counsel.

The State's final witness, Officer Ron Chambers of the Oklahoma City Police Department, identified State's Exhibit No. 2 as the butcher knife he recovered as a result of defendant Lusty showing him where he had hidden it. It was retrieved from a driveway in the middle of the 800 block of North Ellison Street. State's Exhibit No. 2 was then admitted into evidence, over objection. Officer Chambers further testified that subsequent to advising defendant Lusty of his rights, he interviewed him in connection with the homicide of Raymond Martin on April 1, 1974. He identified State's Exhibit No. 4 as a signed statement he and his partner received from defendant Lusty on April 1, 1974. He stated that he, Officer Knight, his partner, and Kathy Wyman, the stenographer, witnessed defendant Lusty sign the written statement. State's Exhibit No. 4 was admitted into evidence.

On cross-examination, he identified defendant's Exhibit No. 1 as another written statement taken from defendant Lusty on March 31, 1974.

At this point, the trial court read to the jury, and for the record, State's Exhibits No. 3 and No. 4, the confessions of both defendants. The transcript of those proceedings is attached hereto as Appendix A and B, respectively. The State then rested its case.

Neither defendant elected to testify and neither offered evidence in his own behalf, except that defendant Lusty did

offer his first confession of March 31, 1974, as defendant's Exhibit No. 1.

Defendant's first assignment of error alleges there was no corroboration of his confession. In Moreno v. State, Okl. Cr., 504 P.2d 1241 (1972), this Court said:

> ". . . It has long been the law of this State that a confession not corroborated by independent proof of the corpus delicti, will not sustain a conviction. Shires v. State, 2 Okl. Cr. 89, 99 P. 1100 (1909). . . ."

Further, this Court held in Drake v. State, Okl. Cr., 437 P.2d 461 (1968), in the first paragraph of the Syllabus:

> "It is not necessary that the corpus delicti should be proved beyond a reasonable doubt before other evidence may be introduced which corroborates it or strengthens reasonable inferences drawn therefrom. In the absence of other evidence that a crime has been committed it is improper in the trial of a homicide case to admit in evidence the confession of accused, but such confessions are properly admitted in conjunction with other evidence of the corpus delicti, as where there is evidence from which the jury might reasonably infer the commission of the offense charged, it being unnecessary to establish the corpus delicti beyond a reasonable doubt before evidence of the prisoner's confession can be admitted."

In the instant case, the State's evidence established that a dead body was found and that said body had marks of violence upon it indicating that the deceased came to his death by violent means. Furthermore, when the evidence of the dead body is combined with the testimony of the medical examiner that the deceased died of multiple stab wounds [Tr. 244] and the testimony concerning the murder weapon [Tr. 203, 227], it becomes apparent that the corpus delicti was clearly established. Accordingly, we find there was sufficient independent evidence to corroborate defendant's confession.

Defendant further contends that the confession of co-defendant Lusty was inadmissible against him as it violated his constitutional right of confrontation. In support of this contention, defendant relies on the case of Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968),

which held that the admission at a joint trial of evidence of a co-defendant's extrajudicial confession implicating the defendant violated the defendant's constitutional right of confrontation. After a careful examination of the record, we cannot agree. Subsequent to Bruton, supra, the United States Supreme Court held, on no less than three occasions:

> "The mere finding of a violation of the Bruton rule in the course of the trial, however, does not automatically require reversal of the ensuing criminal conviction. In some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the co-defendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error."

Schneble v. Florida, 405 U.S. 427, 430, 92 S.Ct. 1056, 31 L.Ed.2d 340 (1972). See also, Brown v. United States, 411 U.S. 223, 93 S.Ct. 1565, 36 L.Ed.2d 208 (1973), and Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726, 23 L.Ed.2d 284 (1969).

In the instant case, the confession of co-defendant Lusty, although erroneously admitted, was merely cumulative of other overwhelming and uncontradicted evidence properly before the jury. Furthermore, the allegedly inadmissible statement of Lusty at most tended to corroborate and was compatible with the details of defendant's comprehensive confession. In Bruton, supra, the Court indicated:

> "A defendant is entitled to a fair trial but not a perfect one."

Additionally, however, that Court held in Chapman v. California, 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967):

> ". . . [B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. . . ."

Applying the above standard, we conclude that the jury would not have found the State's case significantly less persuasive had Lusty's confession been excluded. The distinguishing

factor here is that both defendants made substantially identical statements of their own guilt and neither, by their statements, stood in antagonistic positions at the trial as between themselves. We feel that this factor takes the case out of the purview of Bruton, supra, and makes an exception to the rule of that case because the turning factor involved is that the denial of the Sixth Amendment right to confrontation must result in some prejudice by reason of the admission of the confession into evidence. This Court does not see how the defendant can seriously contend that the statement of a co-defendant can prejudice one who has already admitted his participation in a criminal act. The admission of this statement, therefore, was at most, harmless error. See, Gregor v. State, Okl.Cr., 505 P.2d 519 (1973).

Defendant also contends that the confession of co-defendant Lusty, his accomplice, was not corroborated as required by 22 O.S.1971, § 742. Again, we cannot agree. This Court stated in Rider v. State, Okl.Cr., 494 P.2d 347 (1972):

> "As to the adequacy of the corroborative evidence, this Court has held, that the corroborative evidence must of itself, and without the aid of the testimony of the accomplice, tend in some degree to connect the defendant with the commission of the offense; and independent evidence merely consistent with the main story is not sufficient to corroborate if it requires any part of the accomplice's testimony to make it tend to connect the defendant with the crime. Such evidence need not of itself be sufficient to establish defendant's guilt, but there must be some evidence independent of the accomplice's testimony, which tends to connect the defendant with the offense committed. Further, the evidence independent of the testimony of the accomplice must tend to connect defendant with the crime itself, and not simply with its perpetrators. The corroborating evidence may be sufficient, although by itself slight, but it is not sufficient if it merely tends to raise a suspicion of guilt. Kirk v. State, 10 Okl.Cr. 231, 135 P. 1156 (1913). The accomplice's testimony need not be corroborated in detail, but testimony of accomplice must be corroborated by such other evidence of material parts of his testimony as will tend to connect the defendant with commission of the offense. Sanders v. State, Okl.Cr., 341 P.2d 643 (1959)."

We have no doubt that the evidence in the instant case meets the standards enunciated in Rider, supra. The defendant's own statement, which was properly admitted into evidence against him, supports in substantial measure the statement of the accomplice Lusty concerning the events leading up to the death of Raymond Martin, and constitutes sufficient independent evidence to connect the defendant with the commission of the offense. See, Davis v. State, Okl.Cr., 524 P.2d 46 (1974).

In his final assignment of error, the defendant contends that the death sentence is unconstitutional by virtue of the decision of the United States Supreme Court in the consolidated cases of Furman v. Georgia, Jackson v. Georgia and Branch v. Texas, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). However, in this regard we need only observe that this contention was thoroughly analyzed and rejected by this Court in the consolidated opinion of Williams and Justus v. State, Okl. Cr., ___P.2d ___, F-74-648 and F-74-650 (1975).

The evidentiary hearing contemplated under the provisions of 21 O.S.Supp.1974, §§ 701.5 and 701.6 was previously assigned and heard by this Court. No evidence was offered by either the defendant or the State upon that hearing. Rather, shortly prior thereto, the defendant filed a motion requesting that this Court establish guidelines for the review of death sentences under those statutory provisions. As we have since held in our decision in Williams and Justus v. State, supra, that these provisions are unconstitutional, no further discussion thereof is necessary here.

Pursuant to Rule 1.11 of this Court, 22 O.S.Supp.1974, Chp. 18, App., this case was previously assigned and heard

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for oral argument. We have now carefully reviewed the entire record before this Court, and thoroughly considered the argument and authority presented, and have determined that the record is free of any error of law requiring reversal. The judgment and sentence is, accordingly, AFFIRMED.

Pursuant to Rule 1.18, 22 O.S.Supp.1974, Chp. 18, App., the defendant is advised that any Petition for Rehearing herein must be filed with the Clerk of this Court within fifteen (15) days of the date upon which this Opinion is filed therein.

AN APPEAL FROM THE DISTRICT COURT, OKLAHOMA COUNTY, OKLAHOMA,
HONORABLE CHARLES L. OWENS, JUDGE.

WILLIAM DALE DAVIS was convicted of the offense of First Degree Murder; was sentenced to Death, and appeals. Judgment and sentence AFFIRMED.

DON ANDERSON, PUBLIC DEFENDER,
OKLAHOMA COUNTY,
Attorney for Appellant,

LARRY DERRY BERRY, ATTORNEY GENERAL,
ROBERT L. McDONALD, ASST. ATTY. GEN.,
Attorneys for Appellee.

PER CURIAM

APPENDIX A

"THE COURT: 'Voluntary Statement, 4-3-74. Place: Oklahoma City Police Department. Time: 12:05 p.m. Relative to: Homice [sic] of Raymond Martin. Occurring: 10:00 p.m. Date: 3-29-74. Place: 1219 Northwest 8th, Oklahoma City, Oklahoma.

I, the undersigned, William Dale Davis, of 1219 Northwest 8th, Oklahoma City, Oklahoma, being twenty years of age, born at Sioux City, Iowa, on April 27, 1953, do hereby make the following statement to Sargeant [sic] Larry Upchurch and J. Guinn, they having first identified themselves as police officers, knowing that I may have an attorney in my behalf present and that I do not have to make any statement nor incriminate myself in any manner. I make this statement voluntarily, of my own free will, knowing that such statement could later be used against me in any court of law, and I declare that this statement is made without any threat, coercion, offer of benefit, favor or offer of favor, leniency or offer of leniency by any person or persons whomsoever, and that if I cannot afford an attorney, that one will be appointed by the court free of charge. I also understand that I may stop the questioning for the purpose of consulting an attorney.

QUESTION: Do you understand your rights as listed above?

ANSWER: Yes.

QUESTION: Are you willing to waive these rights and give a statement?

ANSWER: Yes.

QUESTION: Mr. Davis, did you previously live at 1219 Northwest 8th, Apartment 9?

ANSWER: Yes.

QUESTION: Did you have a roommate at that apartment?

ANSWER: Yes.

QUESTION: What was the roommate's name?

ANSWER: Jonoy Joe Lusty.

QUESTION: Directing your attention to Friday evening, the date being 3-29-74, were you and Jonoy Lusty together at 1219 Northwest 8th, Apartment 9?

ANSWER: Yes.

QUESTION: Did you and Mr. Lusty have any conversation about the manager of the apartment and if so, what was that conversation?

ANSWER: Yes. I told Jonoy that we could rob the manager and I told him I was going to kill him. He didn't believe me and he went to sleep for awhile. When he woke up I asked him if he still wanted to rob him.

QUESTION: Did Jonoy Joe Lusty finally agree to go with you and rob the apartment manager?

ANSWER: Yes.

QUESTION: What time, if you can remember, did you and Joney Lusty go to the manager's apartment?

ANSWER: It was ten after nine.

QUESTION: Did you knock on the apartment manager's door?

ANSWER: Yes.

QUESTION: What happened when the apartment manager answered the door?

ANSWER: He opened the curtain on the door and he asked what we wanted. I told him we were going to pay some rent. Then he opened the door. We walked in and he was asking us if we wanted to move over to another room and split up. I told him that I was going to go ahead and pay my rent right then and then he started walking towards the kitchen and I pulled a knife and started stabbing him.

QUESTION: The first time you stabbed him, do you remember if it was in the back?

ANSWER: It was right on the right side.

I have read or have had read to me the foregoing statement consisting of five pages and the facts contained therein are true and correct. Signed by Willie Davis.

QUESTION: How many times do you remember stabbing Mr. Martin?

ANSWER: I don't really remember, I thought that it was about twenty times.

QUESTION: Did he fall to the corner in the kitchen after you stabbed him?

ANSWER: Yes.

QUESTION: Did you stab any more after he was on the floor?

ANSWER: Yes.

QUESTION: When you quit stabbing him, what did you do next?

ANSWER: I got up and started roaming through the drawers.

QUESTION: What were you looking for?

ANSWER: Money.

QUESTION: Did you find any money?

ANSWER: About forty to thirty-five dollars.

QUESTION: Where did you find that money?

ANSWER: In one of the kitchen drawers.

QUESTION: What was Joney Lusty doing while you were going through the drawers after you stabbed the man?

ANSWER: I believe he was in the bedroom doing something, don't know what.

QUESTION: Did you intend to kill the man when you went in?

ANSWER: Yes.

QUESTION: Why did you intend to kill him?

ANSWER: I was just pissed off.

QUESTION: Did you see Joney Lusty going through the dead man's pockets?

ANSWER: I can't remember. I ran out into the living room and he went back into the kitchen.

QUESTION: While you were in the apartment did you find a gun?

ANSWER: Yes.

QUESTION: Did you find the gun or did Joney find the gun and give it to you?

ANSWER: Joney found it and asked if I wanted it and I said yes.

QUESTION: Did you take the gun?

ANSWER: Yes.

QUESTION: Is this the same gun that you had in your possession when you were arrested?

ANSWER: Yes.

QUESTION: Who did the knife belong to that you used to stab the man?

ANSWER: I found it, it was mine.

QUESTION: Did Joney know that you intended to kill the man when you went in to rob him?

ANSWER: I told him, but he didn't believe me.

QUESTION: The knife that you used to stab the man, would you describe that knife to us?

ANSWER: It was a brown handled Bowie knife with about a 5 1/2 inch blade.

QUESTION: Was this the same knife that you took Sargeant [sic] Upchurch and Detective Guinn to an alley between Broadway and Robinson, between Southwest 4th and Southwest 5th, and discovered the knife buried in the ground at that location?

ANSWER: Yes.

QUESTION: Would you describe how you buried the knife?

ANSWER: I stuck the blade in first and then stamped it in the ground with my foot.

I have read or had had [sic] read to me the foregoing statement consisting of five pages and the facts contained therein are true and correct. Willie Davis's signature.

QUESTION: Willie, will you describe, if you can remember, the kind of clothing the victim was wearing when you stabbed him?

ANSWER: He was wearing some dark colored slacks and a green shirt.

QUESTION: Do you recall what color belt he had on?

ANSWER: No.

QUESTION: What kind of clothing were you wearing at the time?

ANSWER: Orange colored slacks and I can't remember what color the shirt was.

QUESTION: What kind of shoes were you wearing at the time?

ANSWER: Working boots.

QUESTION: Did the boots have any kind of a pattern on the soles?

ANSWER: They were pretty worn out, but they had little square deals on them.

QUESTION: Did you take anything with you in the man's apartment to use to wipe up fingerprints?

ANSWER: A pair of shorts. I wiped some blood up off the floor.

QUESTION. Did you get blood on your clothing when you stabbed the man?

ANSWER: Yeah, I got a little bit.

QUESTION: Did you use a white towel to wipe up any blood or clean the blood off yourself?

ANSWER: I can't remember if I used a towel.

QUESTION: Willie, after you and Jonev left the manager's apartment, did you go back to your room?

ANSWER: Yes.

QUESTION: What did you do then?

ANSWER: I got a change of clothes and put the clothes that I was wearing in a box with some stuff out of the apartment and threw them away.

QUESTION: Did you and Jonev take everything out of your room and move out at that time?

ANSWER: Yes.

QUESTION: Did you throw anything away in the trash cans behind your apartment at that time?

ANSWER: Yes.

QUESTION: Do you remember what you threw away there?

ANSWER: There were just papers and junk that we had in the apartment.

QUESTION: Before you left the manager's apartment did you pick up a butcher knife that came out of the apartment and give it to Joney?

ANSWER: Yes.

QUESTION: After you and Joney left the apartment what did you do then?

ANSWER: We ran down and threw part of the clothes in some trash cans.

QUESTION: Was the trash can a large dempsey dumpster type?

ANSWER: That was one of them.

QUESTION: Did you throw clothing in another trash can besides that one?

ANSWER: A little trash can.

QUESTION: What did you throw in the small trash can?

ANSWER: Part of the bloody clothes.

QUESTION: Did you and Joney split up any money that came out of the man's room?

ANSWER: Yes.

QUESTION: How much did you get for your share?

ANSWER: I got about thirty dollars.

I have read or have had read to me the foregoing statement consisting of five pages and the facts contained therein are true and correct. Willie Davis's signature.

QUESTION: Did you get any change out of the man's apartment?

ANSWER: Yes.

QUESTION: Where did you get the change at in the apartment?

ANSWER: I believe it was in a drawer.

QUESTION: What denomination was the change in?

ANSWER: Quarters and dimes.

QUESTION: Did you notice if any of the quarters and dimes had green or blue paint on them?

ANSWER: I saw one dime that had some blue paint.

QUESTION: Did you see the man's bilifold?

ANSWER: Yes.

QUESTION : Do you remember what color it was?

ANSWER: Black.

QUESTION: Do you know what happened to the man's billfold?

ANSWER: It got thrown away somewhere.

QUESTION: Did you throw it away or did Joney throw it away?

ANSWER: I'm not sure, but I think I did.

QUESTION: Did you and Joney split up after you left the apartment?

ANSWER: Yes.

QUESTION: What did you do then?

ANSWER: I hid the knife and went and got a bus ticket to Sioux City, Iowa. I went to Iowa and came back.

QUESTION: Did you see anybody or talk to anybody in Sioux City, Iowa?

ANSWER: No.

QUESTION: Did you dispose of anything that belonged to you while you were on that trip?

ANSWER: I threw a pair of working boots away.

QUESTION: Was these the boots you were wearing at the time of the killing?

ANSWER: Yes.

QUESTION: What town were you in when you threw the boots away?

ANSWER: Joplin, Missouri.

QUESTION: Did you buy any other kind of shoes in that town?

ANSWER: Yes.

QUESTION: What kind of shoes did you buy?

ANSWER: Some tennis shoes.

QUESTION: Were these the shoes you were wearing when you were arrested?

ANSWER: Yes.

QUESTION: What did you do when you came back from Iowa on the bus?

ANSWER: I went to Midwest City and got on this church bus.

QUESTION: Did anyone approach you while you were on the church bus?

ANSWER: Yes.

QUESTION: Who was that, if you know?

ANSWER: I found out that he was a preacher.

QUESTION: Were you at the preacher's house when you decided to call the police and turn yourself in?

ANSWER: Yes.

QUESTION: Did you make the call to the police or did you have the preacher make the call?

ANSWER: The preacher.

I have read or have had read to me the foregoing statement consisting of five pages and the facts contained therein are true and correct. Willie Davis's signature.

QUESTION: When did you learn that the police were looking for you in reference to the murder?

ANSWER: Sunday.

QUESTION: How did you learn that?

ANSWER: A newspaper.

QUESTION: Willie, have you told the entire truth in this statement?

ANSWER: Yes.

QUESTION: Did you make this statement voluntarily of your own free will?

ANSWER: Yes.

QUESTION: What kind of education do you have?

ANSWER: I graduated from the twelth [sic] grade.

QUESTION: Do you have any kind of mental problem that you know of?

ANSWER: No.

QUESTION: Have any threats or promises of any kind been made to you in reference to making this statement?

ANSWER: No.

QUESTION: Are you aware that you are charged with Murder in the First Degree?

ANSWER: Yes.

QUESTION: Are you aware of the penalty that this charge carries on conviction?

ANSWER: Yes.

QUESTION: What is the penalty for Murder in the First Degree in Oklahoma?

ANSWER: The death penalty.

QUESTION: Were you advised of your rights to have a lawyer present during this statement prior to making this statement?

ANSWER: Yes.

QUESTION: Did you waive your rights to a lawyer?

ANSWER: Yes.

QUESTION: Willie, do you have anything else that you would like to add to this statement at this time?

ANSWER: I did the killing and Joney Joe Lusty didn't have anything to do with that.

QUESTION: But Joney Lusty was with you at the time and took some of the money from the manager's apartment, is that correct?

ANSWER: Yes.

I have read or have had read to me the foregoing statement consisting of five pages and the facts contained therein are true and correct.'

Signed by Willie Davis, and there are three witnesses' signatures and the Notary Public."

APPENDIX B

"THE COURT: Again, this statement, Exhibit Four has been admitted in evidence and I will now read it.

'4-1-74, Oklahoma City Police Departme . 6:40 p.m. Relative to the homicide of Raymond Martin, occurring at 10:00 p.m., 3-29-74, 1219 Northwest 8th, manager's apartment, Oklahoma City.

'I, the undersigned, Joney Joe Lusty, of 1219 Northwest 8th, Number Nine, Oklahoma City, Oklahoma, being twenty years of age, born at Oklahoma City, Oklahoma, on 10-26-53, do hereby make the following statement to Detective Knight and Detective Chambers, they having first identified themselves as police officers, knowing that I may have an attorney in my behalf present and that I do not have to make any statement nor incriminate myself in any manner. I make this statement voluntarily, of my own free will, knowing that such statement could later be used against me in any court of law, and I declare that this statement is made without any threat, coercion, offer of benefit, favor or offer of favor, leniency or offer of leniency by any person or persons whomsoever, and that if I cannot afford an attorney, that one will be appointed by the court free of charge. I also understand that I may stop answering questions at any time that I desire, or stop the questioning for the purpose of consulting an attorney.

Do you understand your rights as listed above?

ANSWER: Yes.

Are you willing to waive these rights and give a statement? ANSWER: Yes.

QUESTION: Mr. Lusty, did you give a previous voluntary statement in regards to the above homicide to Detective Guinn on March 31, 1974, at about 1:30 p.m.?

ANSWER: Yes, but not a full statement.

QUESTION: Mr. Lusty, at approximately 5:00 p.m. on April 1, 1974, did you state to these officers (Knight and Chambers) that you wish to give a full and complete statement as to what had transpired from the afternoon of March 29, 1974, to the early morning hours of March 30, 1974?

ANSWER: Yes.

QUESTION: Mr. Lusty, how much education do you have?

ANSWER: I went to the 10th grade.

QUESTION: Mr. Lusty, can you read and write?

ANSWER: Just a little bit, very little.

QUESTION: Mr. Lusty, I'm going to ask you to relate to us your activities starting at approximately 5:00 p.m. on 3-29-74, when you and Willie Davis, who was your roommate at the time, were sitting in your room at 1219 Northwest 8th, Apartment Number Nine.

ANSWER: Me and Willie was sitting in the room talking, his first subject was why don't we rob the manager, that he wanted to rob the manager. I told him no that it wouldn't be worth it. So I told him I was going to move. So I packed my clothes up. Willie helped me take my clothes to a mission on Southwest 5th, then we came back

to the room. About 6:30 Willie brought up the subject again about robbing the manager. He said it would be easy. I told him that it wouldn't. He said that the manager carried a lot of money on him all the time. He told me he had seen the manager with a lot of money some time ago. I told him that I would think about it and dozed off and went to sleep. When I woke back up the time was 10:00 p.m. Willie asked me again if I wanted to go through with the robbery. So I told him O.K. Me and Willie knocked on the manager's door. The manager looked outside the window. I had told the manager that we come to pay the rent. He let us in and as we was walking I was beside the manager--

I have read or have had read to me the foregoing statement consisting of three pages and the facts contained therein are true and correct. Joney Joe Lusty's signature.

--and Willie was behind the manager. As we got halfway through the kitchen Willie stabbed him in the back and stabbed him again. Willie had his arm around the manager's neck and kept stabbing him and he staggered to the kitchen and then fell on the floor on his back and he stabbed him again in the stomach and on the side and up in the chest and I got up and closed the curtain and turned on the light. I looked in the drawer and Willie was doing the same. Then we went in the living room, looked in the bookcase bed, and found a .22 pistol. I handed it to Willie, the [sic] I went to look in the drawers in the bedroom. Came back out, back in the kitchen I found a watch and some keys. I got a towel and wiped up the blood on the floor. Willie had picked up a knife, a butcher knife, and handed it to me. Then we went back to the living room, no that's wrong, we was in the kitchen, then I took the man's billford [sic] out of his back pocket, took another one out of the front pocket and went through the drawers in the kitchen, we didn't find anything else. Walked back in the living room found a jar of quarters and dimes on the television. We took the money out of the jar and left the jar there. After that we went up toward the door to see if anybody was coming, went back to our room and I pulled out some small bills and laid it on the bed and Willie said to go ahead and split it some where else. We changed clothes in our room. Willie picked up a box that had our old clothes in there and white towel that I had, I put it in the trash can. I took the trash can out in the back, that had the white towel in it. I walked down the road about a half a block and hide the butcher knife. As I was coming back towards the apartment Willie was coming out with a big box. We went down the road towards the alley and I took out the shirt and pants that I had on out of the box and we went on down the alley. I walked faster than Willie did and he came about half a block behind me. We went up towards 7th Street, that would be heading east, we went to behind a building somewhere and threw the box away. We walked south where my old apartment used to be at and there I took out the money and gave it to Willie, then he split it with me. From there we went back to SW 2nd Street by South Lee where he went south and I kept on walking on SW 2nd. I then took the little black coin purse by the corner light and opened it up, took the change out of there, put the black pocketbook in my pocket. I then took out the other billfold that I had taken from the manager and opened it up. There was some money in there, I don't know how much. I took the money out of it and put it in my left shirt pocket. I went on down towards Walker on 1st Street and tossed it away. I went back north to a bar, made a telephone call, called a taxi, have him come after me to go to SE 18th and from there that was where I was at until about 3:00 in the morning.

QUESTION: Joney, while you were sitting in your apartment with Willie at about 5:00, were you or Willie drinking or sniffing any paint or glue?

ANSWER: No.

QUESTION: Joney, had you and Willie been drinking that day?

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ANSWER: I had been drinking earlier that day, I had drank a six pack about noon.

QUESTION: Joney, did the manager, Mr. Martin, yell or say anything when Willie started stabbing him?

ANSWER: He just mumbled.

QUESTION: Joney, you stated that you was going to move from the apartment, was it because you were having arguments with Willie or were you just going to move out?

ANSWER: I was going to move out because the rent was up Saturday.

I have read or have had read to me the foregoing statement consisting of three pages and the facts contained herein are true and correct. Joney Joe Lusty's signature.

QUESTION: Joney, did you see Willie with any type of knife on him before you and Willie went to the apartment of the manager?

ANSWER: Yes.

QUESTION: Joney, would you describe this knife?

ANSWER: The handle was black and the blade was about five and a half inches long. It was a hunting knife type, that the blade does not fold up.

QUESTION: Joney, where did Willie carry that knife that you just mentioned before?

ANSWER: Well, he usually carried it in his back pocket.

QUESTION: Joney, when you and Willie were walking to the door of the manager's apartment did you see Willie carrying the above mentioned knife?

ANSWER: Yes.

QUESTION: Joney, what hand was he carrying it in?

ANSWER: The right hand.

QUESTION: Joney, you mentioned two billfolds and one black coin purse, would you tell me out of which pocket you took each billfold and purse?

ANSWER: The billfold was in the back in the right pocket and the coin purse was in the drawer. There was not a third billfold. The large amount of money was in his left pants pocket with a safety pin and a white piece of paper with some writing on it.

QUESTION: Joney, about how much money was in the billfold that you took out of the back pants pocket of the manager?

ANSWER: Less than $100.00.

QUESTION: Joney, is this the money that you and Willie split?

ANSWER: Yes.

QUESTION: Joney, did you take anything else off of the victim, Mr. Martin?

ANSWER: I didn't take anything else off of the manager, but I did take a small pocket knife with a yellow handle off the kitchen table, and some keys, and that watch, being Bulova, with black leather band, with kind of a small face.

QUESTION: Joney, is there anything else that you would like to add to this statement?

ANSWER: Yes. Willie told me when we got back to the room that he had stabbed himself in the leg while he was stabbing the man, and that's about all.

I have read or have had read to me the foregoing statement consisting of three pages and the facts contained therein are true and correct.' Signed 'Joney Joe Lusty' and there are three witnesses."

APPENDIX B

REASONS FOR GRANTING THE WRIT

I.

INTRODUCTION

In 1972, this Court held that the penalty of death could not be inflicted under a statutory scheme which permitted its arbitrary, rare and discriminatory use. Furman v. Georgia, 408 U.S. 238 (1972). Oklahoma's extant capital punishment statutes were thereby invalidated. Koonce v. Oklahoma, 408 U.S. 934 (1972); Fesmire v. Oklahoma, 408 U.S. 935 (1972); Menthen v. Oklahoma, 408 U.S. 940 (1972).[3]

Effective May 17, 1973, the Oklahoma legislature devised new measures for the imposition of the death penalty for the newly defined crime of first degree murder.[4] 21 Okla. Stat. Ann. §§701.1, 701.3, 701.5 and 701.6 (1975-76 Supp.). Under the 1973 enactment, homicides committed "without authority of law" and with "premeditated design" to effect death are murder in the first degree if committed under any of ten circumstances:

> "1. When perpetrated against any peace officer, prosecuting attorney, corrections employee or fireman while engaged in the performance of his official duties;
>
> "2. When perpetrated by one committing or attempting to commit rape, kidnapping for the purpose of extortion, arson in the first degree, armed robbery or when death occurs following the sexual molestation of a child under the age of sixteen (16) years;
>
> "3. When perpetrated against any witness subpoenaed to testify at any preliminary hearing, trial

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3/ See also Pate v. State, 507 P.2d 915, 916 (Okla. Cr. App. 1973): "After an exhaustive study of the opinions rendered by the Supreme Court of the United States, this court reluctantly finds that it is impermissible, under said decisions, to impose a sentence of death on any convicted person until such time as the laws have been duly enacted conforming to the standards set forth in Furman v. Georgia."

4/ Prior to Furman, kidnapping for ransom, armed robbery and rape were also punishable in Oklahoma by death. 21 Okla. Stat. Ann. §745 (1958); 21 Okla. Stat. Ann. §801 (1958); 21 Okla. Stat. Ann. §1115 (1975-76 Supp.).

or grand jury proceeding against the defendant who kills or procures the killing of the witness, or when perpetrated against any human being while intending to kill such witness;

"4. When perpetrated against the President or Vice President of the United States of America, any official in the line of succession to the Presidency of the United States of America, the Governor or Lieutenant Governor of this state, a judge of any appellate court or court of record of this state, or any person actively engaged in a campaign for the office of the Presidency or Vice Presidency of the United States of America;

"5. When perpetrated by any person engaged in the pirating of an aircraft, train, bus or other commercial vehicle for hire which regularly transports passengers;

"6. When perpetrated by a person who effects the death of a human being in exchange for money or any other thing of value, or by the person procuring the killing;

"7. Murder by a person under a sentence of life imprisonment in the penitentiary;

"8. When perpetrated against two or more persons arising out of the same transaction or occurrence or series of events closely related in time and location;

"9. When perpetrated against a child while in violation of Section 843, Title 21 of the Oklahoma Statutes; and

"10. Intentional murder by the unlawful and malicious use of a bomb or of any similar explosive."

21 Okla. Stat. Ann. §701.1 (1975-76 Supp.)

If a first degree murder case is tried to a jury, the jury "shall determine only whether the defendant is guilty or not guilty . . . and upon a finding of guilty shall so indicate on their verdict and state affirmatively in their verdict that the defendant shall suffer death."[5] In the event of a first degree murder conviction after a bench trial or upon a guilty plea, "the court shall enter a judgment and sentence of death."[6] The statute authorizes capital juries to be instructed "regarding

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5/ 21 Okla. Stat. Ann. §701.3 (1975-76 Supp.)

6/ Ibid.

lesser and included offenses and lesser degrees of homicide if the evidence warrants such instructions" and if "the judge . . . states into the record his reasons for giving the instruction based upon the evidence adduced at trial."[7] Although §701.3 states that "[e]very person convicted of murder in the first degree shall suffer death,"[8] §701.5 requires the Court of Criminal Appeals to conduct "an evidentiary hearing" in all death cases for the purpose of determining inter alia "whether the sentence of death is substantially disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Such "substantially disproportionate" death sentences must be modified to sentences of "life in the penitentiary at hard labor."[9]

7/ Ibid.

8/ Ibid.

9/ 21 Okla. Stat. Ann. §701.6. (1975-76 Supp.).Oklahoma has long permitted appellate review of criminal sentences in an unusual form. See Note, Criminal Procedure - Scope of Appellate Review of Sentences in Capital Cases, 108 U.PA.L.REV. 434, 436 (1960). Under 22 Okla. Stat. Ann. §1066 (1958), the Court of Criminal Appeals possesses power to " . . . modify the judgment appealed from." This power has been held to permit the modification of sentences, Dickman v. State, 336 P.2d 1113 (Okla. Cr. App. 1959), and has been used to reduce death sentences "in furtherance of justice," Murphy v. State, ____ Okla. Cr. ____, 112 P.2d 438, 457 (1941), on the basis of factors deemed mitigating by the appellate court, ibid.; Mitchell v. State, ____ Okla. Cr. ____, 60 P.2d 631 (1936); Methvin v. State, _____ Okla. 60 P.2d 1062 (1936); Peters v. State, ____ Okla. Cr. ____, 211 P.427 (1922), on the basis of factors thought to have prejudiced the judge or jury, Young v. State, ____ Okla. Cr. ____, 200 P.260 (1921); Mays v. State, ____ Okla. Cr. ,197 P.1064 (1921), on the basis of error deemed insufficiently substantial to warrant a new trial, Gibson v. State, 501 P.2d 891 (Okla. Cr. App. 1972); Sango v. State, _____ Okla. Cr. ____, 5 P.2d 400 (1931); Doublehead v. State, _____ Okla. Cr. ____, 228 P.170 (1924), or for no apparent or stated reason, Noble v. State, ____ Okla. Cr. ____, 6 P.2d 840 (1932); Jewell v. State, ____ Okla. Cr. ____, 273 P.366 (1929).

This was the law of Oklahoma as it stood at the time of the crime with which petitioner Michael Wayne Green was charged below, and at the time of petitioner's trial. It was changed, however, following petitioner's conviction and the imposition of a death sentence upon him by the trial court. In Williams v. State, 542 P.2d 554 (Okla. Cr. App. 1975), the Oklahoma Court of Criminal Appeals considered the federal constitutionality of the 1973 capital punishment statute. The court initially sustained the provisions of 21 Okla. Stat. Ann. §§701.1 and 701.3 (1975-1976 Supp.) (see pp. 2 - 41, 10 - 12 supra), governing capital sentencing at the trial level, 542 P.2d at 583-584, and it accordingly set the Williams appeal for the "evidentiary hearing" and sentence review prescribed by §701.5 (see pp. 4, 12 supra). But upon further reflection, it held that §§701.5 and 701.6 were unconstitutional insofar as those sections authorized appellate reconsideration and reduction of death sentences that were "substantially disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant" (see pp. 4, 12 supra); it vacated its order for an "evidentiary hearing" of Williams' appeal; and it affirmed Williams' death sentence as imposed by the trial court.

> "We are now of the opinion that 21 O.S. Supp. 1974, §§ 701.5 and 701.6, are unconstitutional. The provisions regarding the hearing contemplated therein are so vague, indefinite and uncertain that they are incapable of rational interpretation and implementation without additional legislation. Also, such a hearing is duplicitous to that procedure previously established for the presentation of evidence before the trial court upon any legal issue, including such issues as adherence to principles of due process and equal protection of the law, with this Court then fulfilling the role of appellate review rather than a court of first impression. We do not by our decision herein, however, in any manner preclude or limit the right of a defendant before this Court on appeal to present a Motion for New Trial based upon newly discovered evidence as otherwise provided for in 22 O.S. 1971, §953. See also, Rule 2.12, 22 O.S.Supp.1974, Ch. 18, App. Nothing in this opinion shall preclude the de-

> fendants from asserting violation of constitutionally guaranteed rights not dealt with in this opinion in a post conviction proceeding under the provisions of 22 O.S.1971, § 1080 et seq. Further, under the mandatory scheme of capital punishment adopted by the Legislature, we are of the opinion that the proper remedy, where otherwise appropriate, for deprivation of any accused's right to due process and equal protection of the law is reversal for a new trial rather modification to life imprisonment. The exercise of such modification powers by this Court for an offense for which the legislature has otherwise mandated capital punishment would be violative of Furman. The power of this Court to modify a sentence imposed by the jury or the trial court must be within the limits of the statutory provisions governing the particular crime charged. See, Brown v. State, Okl. Cr. 314 P.2d 362 (1957). Since the Legislature has now provided but one sentence for the offense of First Degree Murder, the appropriate inquiry is whether a conviction for First Degree Murder is consistent with the law and not whether a sentence of death is substantially disproportionate to the penalty imposed in similar cases."

Id. at 583 - 84. The upshot was to leave Williams -- together with petitioner Green and others similarly situated[10/] -- subject to the penalties of death decreed upon them at the trial level without the opportunity for an evidentiary hearing and possible modification of their death sentences that had been provided by the Oklahoma statute in effect at the time of their respective offenses.

In State ex rel. Young v. Warren, 536 P.2d 965, 971 (Okla. Cr. App. 1975), the court further declared that:

10/ The Oklahoma Court of Criminal Appeals has thus far affirmed the death sentences of at least six similarly situated defendants. Davis v. State, 542 P.2d 532 (Okla. Cr. App. 1975); Williams v. State, 452 P.2d 554 (Okla. Cr. App. 1975); Justus v. State, 452 P.2d 598 (Okla. Cr. App. 1975); Lusty v. State, 452 P.2d (Okla. Cr. App. 1975); Rowbotham v. State, 452 P.2d 610 (Okla. Cr. App. 1975); James v. State, 452 P.2d 1316 (Okla. Cr. App. 1975).

"[s]ince the trial court is required, before giving . . . an instruction on a lesser offense, at a trial for Murder in the First Degree, to cause the record to reflect the evidence upon which he bases his instruction for the lesser offense, it necessarily follows that he may not constitutionally allow plea bargaining between the State and the defendant, or defendants, unless the following conditions are met:

"In all capital cases where a preliminary examination has been conducted on the charge of Murder in the First Degree, as in the instant case, and the testimony taken at said preliminary examination is sufficient to hold the defendant, or defendants, for trial, and the defendant, or defendants, thereafter enters a plea of not guilty at arraignment, the trial court, before permitting a reduction of the charge from Murder in the First Degree to any lesser offense, MUST require the State by competent evidence to establish that sufficient evidence exists to establish that the defendant, or defendants, was guilty of the lesser included offense, and not Murder in the First Degree. We reiterate that to do otherwise would violate the clear intent of 21 O.S. Supp. 1974, §701.3, and render unconstitutional the provisions of 21 O.S. Supp. 1974, §701.1, under the decisions of the United States Supreme Court in Furman v. Georgia, Jackson v. Georgia, and Branch v. Texas, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346."

See pp. 25 - 28 infra. Similar restrictions were placed upon jury instructions regarding lesser offenses and upon prosecutorial charging practices (or at least upon the practice of recharging by the filing of an amended information following dismissal of an initial charge) respectively in Murray v. State, 528 P.2d 739 (Okla. Cr. App. 1974), and Hanna v. State, 540 P.2d 1190 (Okla. Cr. App. 1975). See pp. 23 - 24 , 29 - 36 infra.

Petitioner's death sentence has been affirmed by the Court of Criminal Appeals in this context. The questions presented by his petition for certiorari, therefore, are:

(1) whether the retrospective invalidation of the appellate evidentiary-hearing and sentence-reduction provisions of Oklahoma's capital punishment statute violate the federal constitutional proscriptions against ex post facto laws and fundamental unfairness in criminal prosecutions (Part II infra);

(2) whether Oklahoma's procedures for the administration capital punishment continue -- notwithstanding the cosmetic surgery performed by the Oklahoma Court of Criminal Appeals -- to permit an arbitrarily selective

infliction of the death penalty that affronts Furman v. Georgia, 408 U.S. 238 (1972) (Part III (A) infra);

and

(3) whether the death sentence imposed upon petitioner is otherwise a cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments (Part III (B) infra).

II.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE POST FACTO INVALIDATION OF A STATUTORY PROVISION EMPOWERING AN APPELLATE COURT TO CONDUCT AN EVIDENTIARY HEARING AND THEREAFTER TO REDUCE THE DEATH PENALTY IMPOSED FOR THE CRIME OF FIRST DEGREE MURDER VIOLATES ARTICLE I, SECTION 10 OF THE CONSTITUTION OR THE FOURTEENTH AMENDMENT, WHERE THE EFFECT OF SUCH AN INVALIDATION IS TO SUBJECT A CRIMINAL DEFENDANT TO AN IRREDUCIBLE DEATH SENTENCE THAT WAS NOT AUTHORIZED BY LAW AT THE TIME OF HIS OFFENSE.

The Court of Criminal Appeals' affirmance of petitioner's death penalty after judicially modifying on appeal the 1973 Oklahoma death penalty statute presents a substantial question under the Ex Post Facto Clause for this Court's review. First, by invalidating 21 Okla. Stat. Ann. §701.6 (1975-76 Supp.) which authorized the Court of Criminal Appeals to impose a sentence of "life in the penitentiary at hard labor" in some capital cases, it transformed a procedure whereby some first degree murderers would be sentenced to death and some to life imprisonment to one where all such persons would be sentenced to death; Second, by invalidating 21 Okla. Stat. Ann. §701.5 (1975-76 Supp.), it deprived petitioner of an important procedural right: an "evidentiary hearing" before the Court of Criminal Appeals on the question whether, inter alia, his death sentence was imposed on the basis of "any . . . arbitrary fact" or was "substantially disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant".

Although the maximum sentence both before and after the Court of Criminal Appeals' September 17, 1975, decision remained the same, the range of punishments prescribed for first degree murder was made significantly harsher. In Lindsey v. Washington, 301 U.S. 397, 401 (1937), the Court declared:

> "the ex post facto clause looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed. The Constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer. It is for this reason that an increase in the possible penalty is ex post facto . . . regardless of the length of the sentence actually imposed."

It is clear from the factual context in Lindsey that the words "increase in the possible penalty" mean a "possible increase in penalty", for both the old law and the new law provided a maximum sentence of fifteen years for grand larceny. The new law, enacted after petitioners' crime was committed, simply deprived the sentencing court of the power to impose a minimum sentence.[11/] The Court held that a sentence of imprisonment "for not more than fifteen years" imposed under this new law violated the Ex Post Facto Clause (despite the fact that such a sentence could have been imposed under the old law) because the new sentencing scheme was "more onerous" than the previous one. The Court reached its conclusion by stating flatly that the result reached below by the Court of Criminal Appeals would constitute an Ex Post Facto violation:

11/ Under the old law governing grand larceny, the sentencing court was required to fix a minimum term of between six months and five years, with the prisoner to be eligible for parole at any time after the minimum time was served; the new law provided that "the court . . . shall fix the maximum term of . . . sentence only. The maximum term to be fixed by the court shall be the maximum provided by law for the crimes." Lindsey v. Washington, supra, 301 U.S. at 398.

> "It could hardly be thought that, if a punishment for murder of life imprisonment or death were changed to death alone, the latter penalty could be applied to homicide committed before the change." 12/

301 U.S. at 401 (emphasis added).

This case is squarely controlled by Lindsey. For the Court of Appeals' repeated insistence that Oklahoma had in 1973 enacted "an otherwise mandatory" scheme of capital punishment, Williams v. State, supra, 542 P.2d at 592, 594 recognizes that the legislature contemplated that some convicted first degree murderers would be ultimately sentenced to life imprisonment while others would receive the death sentence.

Affirmation of petitioner's death sentence after the 1973 Oklahoma death penalty was significantly altered is violative of the Ex Post Facto Clause for yet another reason. The Court's declaration in Kring v. Missouri, 107 U.S. 221, 235 (1883), that "[a]ny law passed after the commission of an offense which . . . '[i]n relation to that offense, or its consequences, alters the situation of a party to his disadvantage' is an ex post facto law," has been limited somewhat; and procedural changes which operate only "in a limited and unsubstantial manner to . . . [an accused's disadvantage" are not ex post facto. Beazell v. Ohio, 269 U.S. 167, 170 (1925). See Rooney v. North Dakota, 196 U.S. 319, 325 (1905); Malloy v. South Carolina, 237 U.S. 180, 183 (1915). However, a law which enacts a "harsh and arbitrary"

12/ "Removal of the possibility of a sentence of less than fifteen years . . . operates to . . .[petitioners'] detriment in the sense that the standard of punishment adopted by the new statute is more onerous than that of the old. . . . We need not inquire whether this is technically an increase in the punishment annexed to the crime . . . . It is plainly to the substantial disadvantage of petitioners to be deprived of all opportunity to receive a sentence which would give them freedom from custody and control prior to the expiration of the 15-year term."

Lindsey v. Washington, supra, 301 U.S. at 401-402.

procedural change, Beazell v. Ohio, supra, 269 U.S. at 170, or which takes from the accused a substantial right given to him by the law in force at the time of his crime "cannot be sustained simply because, in a general sense, it may be said to regulate procedure." Thompson v. Utah, 170 U.S. 343, 352 (1898). The Court of Criminal Appeals' ruling deprived petitioner of critically important procedural rights which are not "duplicitous" to existing procedures, Williams v. State, supra, 542 P.2d at 583. and which cannot be vindicated at a hearing on a motion for a new trial or at a post-conviction proceeding. For the Oklahoma Legislature explicitly chose to provide a hearing at which death sentences would be modified when "substantially disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant," Okla. Stat. tit. 21, §701.5, p.4 supra. The Court of Criminal Appeals recognized the importance of this provision when it ruled that "[a]ny attempt by this Court to delineate [a disproportionality standard] . . . would be equivalent to substantive legislation." Williams v. State, supra, 542 P.2d at 593. The Court's decision thus abolishes a procedure for demonstrating that a particular defendant's sentence is "disproportionate" (whatever the Legislature intended by this term).

It is established that the Due Process Clause imposes restraints upon courts which are identical to those imposed on legislatures by the Ex Post Facto Clause. Bouie v. Columbia, 378 U.S. 347 (1964).[13/] The Court should grant certiorari to determine

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13/ "The logical import of Bouie was . . . to extend the ex post facto principle in all its ramifications to any change in the law, whether wrought by legislative amendment, judicial construction, or administrative reinterpretation, which is applied retroactively so as to deprive a criminal defendant of fair notice not only of the criminal nature of his act but also of the punishment to which he will be subject upon conviction." Love v. Fitzharris, 311 F. Supp. 702, 703 (N.D. Cal. 1970).

whether the Oklahoma Court of Criminal Appeals' affirmance of the death sentence in this case subjected petitioner to unconstitutional punishment under the Ex Post Facto and Due Process Clauses.

III.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF MURDER UNDER THE LAW OF OKLAHOMA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

This Court has heretofore granted certiorari and scheduled oral argument in five cases raising cognate questions under the respective capital-punishment procedures of the States of Florida, Georgia, Louisiana, North Carolina and Texas. Proffitt v. Florida, No. 75-5706; Gregg v. Georgia, No. 74-6257; Roberts v. Louisiana, No. 75-5844; Woodson & Waxton v. North Carolina, No. 75-5491; Jurek v. Texas, No. 75-5394. See also Fowler v. North Carolina, No. 73-7031. In the following subsections, we describe the incidents of Oklahoma law and practice which frame similar issues meriting review in petitioner's case.

A. The Perpetuation of Arbitrary Selectivity Under the 1973 Oklahoma Capital Punishment Statute.

Despite the enactment of new death-sentencing procedures in 1973 and their partial invalidation by the Court of Criminal Appeals in 1975, Oklahoma law continues to offer a broad array of discretionary outlets through which the actual infliction of death can be avoided in potentially "capital" cases and, conversely, a capriciously selected random number of "capital" defendants can be doomed while their indistinguishable counterparts are spared.

1. Prosecutorial Charging Discretion

Felony prosecutions in Oklahoma may be initiated by indictment or by information.[14] In the "vast majority of cases, criminal prosecutions are by information." Stone v. Hope, 488 P.2d 616 (Okla. Cr. App. 1971). The county attorney has "full and complete authority to say when an information shall be filed in a felony case." Grimes v. State, 65 Okla. Cr. 99, 83 P.2d 410 (1938). It is his duty "to guard the interests of the state, and the public, and as a quasi judicial officer to determine, before an action is filed, whether or not matters complained of constitute an offense against the state." State v. Snelson, 13 Okla. Cr. 88, 162 p. 444, 445 (1917). His decision not to prosecute may not be superceded by the complainant, Perry v. State, 84 Okla. Cr. 211, 181 P.2d 280 (1947) or by the courts, Best v. Evans, 297 P.2d 379 (Okla. Cr. App. 1956); Ex parte Lewis, 85 Okla. Cr. 322, 188 P.2d 367, 383 (1948); Grimes v. State, 65 Okla. Cr. 99, 83 P.2d 210 (1938).[15]

His decision to proceed may of course be checked if, upon preliminary hearing, a judge determines "either that a public offense has not been committed, or that . . . there is not sufficient cause to believe the defendant guilty thereof." 22 Okla. Stat. Ann. §262 (1969). The consequent dismissal of an information is appealable by the prosecution, State ex rel. Fallis v. Caldwell, 498 P.2d 426 (Okla. Cr. App. 1972); and such a dismissal is also no bar to the prosecutor's refiling of an information and presenting additional evidence at a second preliminary hearing.

14/ Okla. Constitution Ann., Art. 2 §17 (1952), 22 Okla. Stat. Ann. §301 (1969).

15/ Although the grand jury might indict where the prosecutor fails or declines to proceed, it is limited in jurisdiction, 22 Okla. Stat. Ann. 338, and poorly equipped to investigate crimes and to institute prosecutions on its own initiative.

Jones v. State, 481 P.2d 169 (Okla. Cr. App. 1971); Harper v. District Court, 484 P.2d 891 (1971); Nicodemus v. District Court, 473 P.2d 312 (Okla. Cr. App. 1970).[16]

Oklahoma prosecutors are entrusted with the choice of charges upon which to proceed:

> "it was discretionary with the prosecuting attorney to elect before trial for which offense he would prosecute the accused, where the evidence showed the commission, by the same act or transaction, of more than one offense."

Saxon v. State, 19 Okla. Cr. 58, 198 P.107, 108 (1921). See also State v. Sowards, 64 Okla. Cr. 430, 82 P.2d 324 (1938). Compare Winfield v. State, 44. Okla. Cr. 232, 280 P.630, 632 (1929) ("'[i]t is the privilege of the county attorney to charge in an indictment the highest possible offense constituted by any act committed, but if he sees fit to charge a lower offense which is sustained by the evidence and which calls for the infliction of a lesser degree of punishment, a defendant cannot be heard to complain . . . .'"), with Stough v. State, 75 Okla. Cr. 62, 128 P.2d 1028, (1942) ("what charges should be filed against an individual is a matter for the discretion of the county attorney, but where the line of demarcation between offenses has a narrow margin, the safe practice, where the proof is uncertain is to charge the lesser offense"). The decision to proceed on lesser charges is therefore no more subject to challenge than the decision not to prosecute at all. And while the prosecutor's decision to modify a charge by amendment or by dismissal and refiling requires court approval in all cases of dismissal and in cases of amendment after the defendant has pleaded, 22 Okla. Stat. Ann. §304 (1958), 22 Okla. Stat. Ann. §815 (1969), traditionally the

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16/ Dismissals for failure to prosecute promptly, 22 Okla. Stat. Ann. §812 (1969) also do not bar reprosecution for the same offense. 22 Okla. Stat. Ann. §817 (1969).

prosecutor can expect approval where requested, see Perry v. State, 84 Okla. Cr. 211, 181 P.2d 280 (1947), quoted at p. 25, infra.

It is against this background that State v. Hanna, 540 P.2d 1190 (Okla. Cr. App. 1975), was decided. In that case, the Court of Criminal Appeals took a state appeal from dismissal of an information charging murder in the first degree[17/] as an occasion to announce that the prosecutor's subsequent filing of a second-degree amended information was improper.

> "In conformance with our recent holding in State ex rel. Young v. Warren, Okla. Cr., 536 P.2d 965 (1965), we are of the opinion that the state's action in filing an amended information charging murder in the second degree also was erroneous, and the trial court is directed to enter an Order dismissing said information without prejudice to the State's filing a preliminary information, if it elects to do so."

540 P.2d at 1191. Hanna does not preclude amendment or dismissal, see 22 Okla. Stat. Ann. §§304, 815 (1956), and refiling lesser charges where the prosecutor is able to present evidence that the lesser offense occurred and fails to present evidence (which, assuredly the defendant has no motivation to present) that the defendant is guilty of murder in the first degree. Nor does Hanna bar the prosecutor from refiling and presenting evidence of defenses qualifying or contradicting the evidence of first degree murder presented at the initial preliminary hearing. The enforceability of the Hanna "rule" is doubtful in any case, since no party has reason to complain of a nonconforming amendment; and where there is not (as there was in Hanna) a fortuitous interlocutory appeal proceeding in which the prosecutor seeks simultaneously to justify his original charging decision while abandoning it, there

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17/ The trial court had been of the view that "armed robbery could not be committed with an electric iron, an electrical cord and heavy boots." The appellate court disagreed. Id. at 1191. Mr. Hanna was subsequently tried for murder in the first degree and convicted of manslaughter in the first degree, State v. Hanna, District Court, Cleveland County, No. CRF-75-496.

is no reason for any court to question whether his refiling reflects something more or less than his reassessment of the available evidence. Such judicial inquiry is the more unlikely inasmuch as the courts are without authority to require a capital prosecution; they can only (once again, as in Hanna) order dismissal of the less serious charge. Finally, Hanna deals merely with refilings; it neither does nor can restrict or regulate the prosecutor's initial charging determination; that determination remains as wholly discretionary and unaccountable as ever. The upshot is that an Oklahoma prosecutor retains complete and uncontrolled freedom in his original choice to charge or forgo charging a capital offense; and thereafter he retains considerable leeway, limited only by a vague[18] and virtually unenforceable directive of the Court of Criminal Appeals, to reconsider and alter his original choice.[19]

2. Plea Bargaining

The plea bargain, which accounts for up to ninety percent of all criminal convictions in the nation[20] and is "used quite extensively in Oklahoma,"[21] is also predominantly a matter of prosecutorial discretion. Although court approval is required

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18/ See note 35 infra.

19/ For all of the reasons that we have set forth in the text, the Hanna decision of the Court of Criminal Appeals effected no significant limitation of prosecutorial charging discretion in Oklahoma Capital Cases. Like the Young and Murray decisions discussed at pp. 25 - 28 , 29 - 36 infra, Hanna is essentially a cosmetic pronouncement which lacks operational substance. Nevertheless, we may also note that, since Hanna was not decided until September 19, 1975, it could not even arguably have affected the prosecutorial charging practices in use at the time that petitioner's case was "papered" as capital first degree murder.

20/ PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967).

21/ Note, Plea Agreements in Oklahoma, 22 OKLA. L. REV. 81, 83 (1969).

for the dismissal, partial dismissal or amendment required to allow a plea to a lesser charge, 22 Okla. Stat. Ann. §304 (1958), 22 Okla. Stat. Ann. §815 (1969), the county attorney "is the legal representative of the state charged with the responsibility of investigating and prosecuting all public offenses, [and] the trial judge will ordinarily accept his recommendation and dismiss the action." Perry v. State, 84 Okla. Cr. 211, 181 P.2d 280, 286 (1947).

It is true that, in an interlocutory proceeding brought to challenge trial court orders changing venue and granting bail in a capital case,[22] the Court of Criminal Appeals noted that plea discussions had been had and thereupon announced that guilty pleas to lesser charges could not be entered in a capital case unless the State established "by competent evidence" "that the defendant . . . was guilty of the lesser included offense, and not Murder in the First Degree," State ex rel. Young v. Warren, supra, 536 P.2d 965, 971[23] (1975).[24] The Young opinion leaves unclear whether the State is required to convice the court of the defendant's guilt of the lesser and innocence of the greater charge, or merely to show that there is sufficient evidence to raise a question as to which crime was committed. But surely no party to a

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22/ State ex rel.Young v. Warren, supra, Application and Petition dated March 7, 1975 (Okla. Ct. of Cr. App.No.0-75-103.)

23/ See pp. 14-15 supra. This felony-murder prosecution, involving six codefendants, resulted in two discharges on the basis of grants of immunity. Id. at 968, two death sentences, State v. Henson, Muscogee County District Court, No. CRF-74-355 (1975), State v. Bias, Creek County District Court, No. CRF-74-123 (1975), and two pleas to manslaughter in the first degree after testimony that the defendants were intoxicated at the time of the offense. State v. Gregory, Creek County District Court. No. CRF-74-123 (1975); State v. Gibson, Creek County District Court, No. CRF-74-123 (1975).

24/ At the same time, the court specifically announced that grants of immunity, see, Okla. Constitution Ann., Art. 2 §27; 21 Okla. Stat. Ann. §1367, remained acceptable in capital and in non-capital cases. See note 23, supra.

proposed plea agreement will be motivated to contest the sufficiency of evidence that the defendant is guilty only of the lesser offense. Enforcement of the Young "rule," like the Hanna "rule," supra, therefore depends upon a decision of the trial judge to make an unsolicited, independent evaluation of the facts of the case -- or upon the initiation of an unrelated incidental proceeding which might provide the occasion for an appellate pronouncement.

Whether for this reason or because (as we shall see at note 35 infra) the imponderable quality of the legal elements that set off first degree murder from its lesser included offenses ordinarily makes it impossible for a trial court to rule out the propriety of a less-than-first-degree-murder conviction, the fact is that plea bargaining continues in Oklahoma capital cases after and notwithstanding Young. Indeed, in an informal survey limited in time and resources, counsel have been able to document fourteen (14) plea bargains in capital cases since Young:

> Jerry Wayne Freeman, charged with murder in the course of an armed robbery, District Court, Oklahoma County, No. CRF-75-3077, pleaded guilty on March 8, 1976 to murder in the second degree and was sentenced to ten years to life imprisonment.
>
> Dean Joseph Odom, charged with murder in the course of an armed robbery, District Court, Oklahoma County, No. CRF-75-3077, pleaded guilty on March 8, 1976 to murder in the second degree and was sentenced to ten years to life imprisonment.
>
> Charles Edward Anderson, charged with murder in the course of committing armed robbery, District Court, Comanche County, No. CRF-75-1081, pleaded guilty on January 22, 1976 to first degree manslaughter and was sentenced to forty years imprisonment.
>
> William Eugene Craine, charged with murder in the course of committing armed robbery, District Court, Comanche County, No. CRF-75-1081, pleaded guilty on January 22, 1976 to manslaughter in the first degree and was sentenced to forty years imprisonment.
>
> Richard Allen Pinkinpaugh charged with murder for hire in the District Court, Oklahoma County, No. CRF-74-1542 pleaded guilty on January 13, 1976 to murder in the second degree and was sentenced to ten years to life imprisonment.

Gary Dale Turner, charged with first degree murder, District Court, Ottawa County, No. CRF-75-646, pleaded guilty on January 12, 1976 to second degree murder and was sentenced to fifty years to life imprisonment.

Raymond Lee Turner, charged with first degree murder, District Court, Ottawa County, No. CRF-75-646, pleaded guilty on January 12, 1976 to second degree murder and was sentenced to fifty years to life imprisonment.

Phillip Brandon Ervin, charged with murder in the course of armed robbery, District Court, Cleveland County, No. CRF-75-87, pleaded guilty on May 27, 1975 to manslaughter in the first degree and was sentenced to twenty years imprisonment.

Kenneth Eugene Harwell, charged with murder in the course of robbery with firearms, Oklahoma County District Court, No. CRF-75-60, pleaded guilty on November 19, 1975 to manslaughter in the first degree and was sentenced to ten years imprisonment.

Charles Henry Hilliard, charged with murder in the course of committing robbery with firearms, District Court, Oklahoma County, No. CRF-75-2216, pleaded guilty on November 13, 1975 to manslaughter in the first degree and was sentenced to seven years, three to be served in the penitentiary and the remainder to be suspended.

Glen Raymond Parker, charged with murder in the course of committing robbery with firearms, District Court, Oklahoma County, No. CRF-75-2216, pleaded guilty on September 29, 1975 to murder in the second degree and was sentenced to ten years to life imprisonment.

Allen Clayburn Justus, charged with murder in the course of an armed robbery, District Court, Lincoln County, No. CRF-73-109, charge dismissed June 12, 1974, and refiled on the same day in an information charging second degree murder, District Court, Lincoln County, No. CRF 74-57, pleaded guilty on June 12, 1974 to second degree murder and was sentenced to ten years to life imprisonment.

Bobby Joe Williams, charged with murder in the course of an armed robbery, District Court, Lincoln County, No. CRF-73-108, charge dismissed, June 12, 1974, and refiled on the same day in an information charging second degree murder, District Court, Lincoln County, No. CRF-74-57, pleaded guilty on June 12, 1974 to second degree murder and was sentenced to ten years to life imprisonment.

Richard Sonny Erwin, charged with murder of a child, District Court, Pottawatomie County, No. CRF-75-181, pleaded guilty on January 9, 1976 to murder in the second degree and was sentenced to ten years to life imprisonment.

Whether the prosecutorial decisions to make these compromise dispositions were based exclusively upon an evidentiary showing that the crimes in each case were "not Murder in the First Degree" as initially charged, State ex rel. Young v. Warren, supra, 536 P.2d at 971, is, in the nature of the plea-bargaining process, an inscrutable question. Obviously, however, the defendants would have little incentive to charge-bargain in cases where the evidence could only make out less than first degree murder. So it is most likely that post-Young bargains are being made -- as plea bargains have always been made in Oklahoma -- upon a broader basis that includes consideration of the nature of the crime,[25] "the age, record, attitude, and mental condition of the accused," "the strength of the prosecutor's case and the identity of his witnesses"[26] and the philosophy and attitudes of the local prosecutor.[27] [28]

25/ Note, Plea Agreements in Oklahoma, 22 Okla. L. Rev. 81, 83 (1969).

26/ Id. at 84.

27/ Id. at 83:

> "One prosecuting attorney said that he simply would not negotiate with one who is accused of [murder]; . . . however, another prosecuting attorney said that due to the unpredictability of juries, no matter how serious the crime, he will consider a negotiation to make sure that the accused gets some kind of punishment."

28/ In addition, we may note that the Young case was not decided until May 7, 1975. See note 19 supra.

3. Jury Discretion

An Oklahoma jury may, in any case,

> "find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged. . . ." 29/

Multiple-count indictments or informations charging offenses of varying severity in the alternative are authorized, 30/ under which the jury may convict of lesser offenses not technically "included" in the greater. The only limitation upon a capital jury's power in these regards is defined by §701.3 of the 1973 capital punishment statute (pp. 3-4, 11-12 supra), which forbids the submission of evidentially unsupported lessers, Murray v. State, 528 P.2d 739, 740-741 (Okla. Cr. App. 1974), and provides that a trial judge who instructs the jury upon "lesser and included offenses and lesser degrees of homicide . . . shall state into the record his reasons for giving the instructions based upon the evidence adduced at trial."

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29 / Okla. Stat. Ann. tit. 22, §916. See also, 22 Okla. Stat. Ann. §915:

> "Whenever a crime is distinguished into degrees, the jury, if they convict a defendant, must find the degree of the crime of which he is guilty."

30/ "[A]n indictment or information must charge but one offense, but where the same act constitutes different offenses, or the proof may be uncertain as to which of the two or more offenses the accused may be guilty of, the different offenses may be set forth in different forms or degrees under different counts."

22 Okla. Stat. Ann. §404 (1969).

The Murray case just cited was -- like the Hanna and Young cases previously discussed[31] -- an opinion in which the Oklahoma Court of Criminal Appeals pronounced its views upon an issue neither presented nor argued before it, in an apparent concern to ease the tension between Furman and the 1973 law. Two jointly tried defendants, indicted for first degree murder and convicted of second degree murder, urged upon appeal that their pretrial motions for a severance and separate trials had been improperly denied. They prevailed on this contention, and therefore secured reversal of their convictions. The Court of Criminal Appeals added:

> "From a review of the record we further find that the trial court instructed the jury on the offense of Murder in the Second Degree, this being the crime for which the defendants were convicted. It is our opinion, and we so hold, that the evidence in this case did not warrant a Second Degree Murder instruction. The evidence presented was that there was an armed robbery and a homicide. Under this evidence the defendants were either guilty of Murder in the First Degree, or nothing. . . . Therefore, on a retrial of this matter, the trial court should not instruct the jury on the offense of Murder in the Second Degree."

528 P.2d at 740-741. Perhaps because of the way in which the issue arose (or, more accurately, did not arise) in Murray, the court not merely overlooked the impossibility of retrying the

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31/ See pp. 23-28 supra.

defendants for first degree murder,[32] but also failed to explain how -- in any live controversy upon a concrete factual record -- an Oklahoma trial or appellate court could rule as a matter of law that the evidence does not warrant a less-than-first-degree murder instruction. For under Okla. Stat. Ann. §701.1 (1975-1976 Supp.), pp.2-3 supra, neither robbery-murder nor murder in any of the ten enumerated statutory situations constitutes first degree murder unless it is also premeditated; and the presence or absence of the mental state of premeditation is a jury question. It was for this reason, for example, that the trial judge in petitioner's case charged the jury on first degree manslaughter (see pp. 7 - 8 supra), although petitioner had killed a police officer within §701.1(1).

32/ See Price v. Georgia, 398 U.S. 323 (1970). In the case of Murray's codefendant, indeed, the United States District Court for the Western District of Oklahoma has already held that double jeopardy bars the retrial "on the charge of Murder in the First Degree" ordered by the Court of Criminal Appeals in Murray v. State, supra, 528 P.2d at 741. See Grizzle v. Turner, 387 F. Supp. 1 (W. D. Okla. 1975).

Murray does not purport to change the settled law of Oklahoma that, in homicide cases, the court must submit to the jury an instruction upon every degree of homicide which any reasonable view of the evidence suggests, Isaac v. State, 83 Okla. Cr. 33, 172 P.2d 806, 808-809 (1946);[33] that the judge is not to weigh the evidence in formulating his instructions, Lawson v. Territory, 8 Okla. 1, 56 P. 698, 700 (1899);[34] that "[w]here the evidence shows any element of manslaughter, however slight, an instruction defining that degree of homicide is proper," Ging v. State, 31 Okla. Cr. 428, 239 P. 685, 688-689 (1925); that "if there is any doubt about the matter in the mind of the court, the lower degree of the homicide should be submitted for the consideration of the jury," Clapp v. State, 73 Okla. Cr. 261, 120 P.2d 381, 383 (1942); that lesser-offense submissions will be sustained even upon "rather a strained construction" of the evidence, Warren v. State, 6 Okla. Cr. 1, 115 P. 812, 817 (1911); that factual questions regarding a defendant's

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33/ Lesser-offense instructions may be required by the evidence even in the absence of a defense request. See, e.g., Myers v. State, 480 P.2d 950, 952 (Okla. Cr. App. 1969).

34/ Thus, for example, the uncorroborated testimony of a defendant suffices to support and require a lesser-offense charge. Shirey v. State, 520 P.2d 701, 703 (Okla. Cr. App. 1974).

mental state are ordinarily jury issues requiring submission of lesser-offense instructions, Laymon v. State, 513 P.2d 883, 885 (Okla. Cr. App. 1973); Gibson v. State, 501 P.2d 891, 899-900 (Okla. Cr. App. 1972); and, in particular, that any "reasonable doubt . . . as to whether or not the killing was committed with a premeditated design to effect . . . death" supports a lesser offense instruction, Jones v. State, 523 P.2d 1126, 1132 (Okla. Cr. App. 1974) -- even where, as in Jones, the defendant's version of the relevant events is that he was out of the room when his alleged victim committed suicide. In the framework of these principles, it will be the rare case, if any, where the element of "premeditated design" that is prerequisite to a capital first degree murder conviction will not require factual resolution by the jury and support a lesser-offense instruction, thus performing its historic office of "giving [the jurors a] . . . dispensing power [veiled] . . . in a mystifying cloud of words," CARDOZO, LAW AND LITERATURE 100 (1931). For this element "is so obscure that no jury hearing it for the first time can fairly be expected to understand it," ibid.; 35/ and it therefore represents

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35/ The elements which define first degree murder, second degree murder, and manslaughter are exceedingly amorphous. First degree murder (and one form of second degree murder) are characterized by a "premeditated design to . . . effect death." Okla. Stat. Ann. tit. 21, §§701.1, 701.2(1)(1975-1976 supp.). "Design" and "Premeditation" are statutorily defined:

> "Design to effect death inferred[.] A design to effect death is inferred from the fact of killing, unless the circumstances raise a reasonable doubt whether such design existed"; (Okla. Stat. Ann. tit. 21, §702 (1958));

the classic archetype of those ungraspable mental elements so

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35/ cont'd.

> "Premeditation[.] A design to effect death sufficient to constitute murder may be formed instantly before committing the act by which it is carried into execution"; (Okla. Stat. Ann. tit. 21, §703 (1958)).

The Court of Criminal Appeals has frequently discussed the concept of "premeditated design":

> "'A premeditated design under our law need not be entertained for any appreciable length of time. It may be a design formed instantly before committing the act by which it is carried into execution . . . The time requisite to constitute premeditated design may not be distinguishable from the act of the killing, although it may be said to precede the act . . . Premeditation is an intent before the act of killing. It means entertainment by the mind of a design to kill, and is often defined as "thought of beforehand, any length of time, however short." However, the word "premeditatedly" does not mean "thought of" in the sense of "thought over."'"

Easley v. State, 78 Okla. Cr. 1, 143 P.2d 166, 170 (1943)(quoting Basham v. State, 47 Okla. Cr. 204, 287 P. 761, 762 (1930)). Moreover, "'[a] premeditated design to effect death * * * is no more nor less than a mental purpose to take human life.'" Walker v. State, 91 Okla. Cr. 1, 214 P2d. 961, 963 (1950). This mental purpose is "'"formable on the instant preceding the fatal act or some time theretofore, it being sufficient that there be a precedent existence of the purpose and persistency of it to and inclusive of such fatal act."'" Easley v. State, supra, 143 P.2d at 171. See also Jones v. State, 94 Okla. Cr. 359, 236 P.2d 102, 107 (1951); Miller v. State, 523 P.2d 1118, 1122 (Okla. Crim. App. 1974)(defendant could have formed premeditated design to kill between firing second and third pistol shot while he engaged in drunken horseplay). Moreover, "[i]f a killing is occasioned by the use of a deadly weapon, then the design to effect death may be inferred from the fact of the killing." Gatewood v. State, 80 Okla. Cr. 135, 157 P.2d 473, 475 (1945).

A similar gloss does not exist for the element defining one form of second degree murder, "a depraved mind, regardless of human life," see Holmes v. State, 6 Okla. Cr. 541, 119 P. 430, 440 (1911), although Okla. Stat. Ann. tit. 21, §705 (1958) provides that a homicide perpetrated by an act "imminently dangerous to others and evincing a depraved mind, regardless of human life, is not the less murder because there was no actual intent to injure others." See generally, CANNON, AN ANALYSIS OF THE NEW MURDER LAW OF OKLAHOMA (1974).

"refractory to the best-instructed human understanding" [36] that they not merely permit but inescapably require any jury to "conceal from itself its own response to sentiment, under the guise of resolving issues of evidential doubt." [37]

> "[N]o matter how patiently the judge tries to explain to the jury that which he himself only cloudily understands, the net result must be that twelve lay persons have no alternative to using their general sense of the equities of the matter. But this means that these purported rules, at the crucial line of separation between those who are to die and those who are to live, conceal a discretion which, however benevolent, is to all intents and purposes standardless." [38]

And if "'[i]t sometimes happens [that] the jury, in arriving at a verdict, does so by a compromise and fixes a lower degree than the undisputed evidence may disclose,'" Abel v. State, 507 P.2d 569, 572 (1973), (quoting Clapp v. State, 73 Okla. Cr. 261, 120 P.2d 381, 384 (1941)), surely this extra-legal process is most likely to reflect the "natural human tendency to see

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36/ Black, Crisis in Capital Punishment, 31 MD. L. REV. 289, 299 (1971).

37/ KALVEN & ZEISEL, THE AMERICAN JURY 427 (1966).

38/ BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 49-50 (1974).

facts and to evaluate evidence in a manner leading to a desired conclusion"[39] where the stakes are life or death[40] and where the enormity of those stakes is forcibly brought home to the jurors by the requirement that they "state affirmatively in their [first degree murder] verdict that the defendant shall suffer death."[41]

39/ BLACK, op. cit. supra note 38, at 46.

40/ The resort by juries even to verdicts of acquittal as a means of avoiding capital convictions" in cases which were 'willful, deliberate, and premeditated' in any view of that phrase, but which nevertheless were clearly inappropriate for the death penalty" is an historical commonplace. McGautha v. California, 402 U.S. 183, 199 (1971). See the authorities collected in the Brief for Petitioner, Fowler v. North Carolina, No. 73-7031, at pp. 90-92 n.122.

41/ Okla. Stat. Ann. tit. 21, §701.3 (1975-1976 Supp.), p. supra. The Court of Criminal Appeals has indicated that the omission of such a statement would not have the legal effect of sparing the defendant's life, Williams v. State, supra, 542 P.2d at 578-79, but the requirement serves nonetheless to assure that the jury is aware of the life-or-death consequences of its choice of a verdict.

4. Executive Clemency

Under Okla. Const. Ann., art. 6, §10 (1952), and 57 Okla. Stat. Ann. §332 (1969), the Governor of Oklahoma possesses absolute power to commute and pardon -- or to decline to commute or pardon -- as he chooses. The only limitation upon these powers as they apply to capital cases is the requirement that, before the Governor may permanently change a sentence to be served, he must receive a recommendation in the case from the Board of Pardons and Paroles. He need not follow the recommendation, but need only receive it. There are no restrictions or controls upon -- or standards, rules or principles to regulate -- the Board's discretion or the Governor's. "An abuse of the pardoning power [which is conferred in the same terms as the power of commutation] does not authorize the courts to decline to give effect to a pardon, and no court has the power to review the action of the executive in granting a pardon . . . . "Ex parte Crump, 10 Okla. Cr. 133, 135 P.428, 431 (1913).

Since the Court now has before it lengthy briefs in cases from five States raising the question of the constitutionality of capital punishment under the Eighth Amendment, we see no reason to extend the present Petition beyond description of the local Oklahoma doctrines, practices and procedures that present a similar question in petitioner's case. Oklahoma's system for the administration of the death penalty differs in details from those of Florida, Georgia, Louisiana, North Carolina, and Texas -- just as the systems of the latter five States differ from each other in details -- but the differences are insignificant in contrast to the similarities. Arbitrary selectivity in

the choice of those who die or live remains the common characteristic of death-sentencing schemes from State to State, after Furman as before, and however much the numerous discretionary judgments which together doom or spare be diffused, disguised, or papered over with the language of "mandatory" or "automatic" death penalties. For, in fact,

> "[t]he change to a mandatory system . . . [simply has] the effect of shifting some of the discretion exercised by the jury [before Furman] to others, particularly the prosecutor and the executive. By obscuring the visibility of the discretionary judgments, this change can only increase the potential for arbitrary and discriminatory application of the death penalty."42/

B. The Excessive Cruelty of the Death Penalty

This aspect of the Eighth Amendment question presented here is identical to the questions raised in the Fowler, Proffitt, Gregg, Roberts, Woodson-Waxton and Jurek cases, p. 20 supra, and discussed particularly in the respective Parts III of the Briefs for Petitioner in Fowler (No. 73-7031) and Jurek (No.75-5394).

42/ White, The Role of the Social Sciences in Determining the Constitutionality of Capital Punishment, 13 DUQ. L. REV. 279, 289 n.69 (1974). See also BLACK, op. cit. supra note 38, at 92-93.